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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 7

WILBURN BOAT COMPANY, ET AL., PETITIONERS,

vs.

FIREMAN'S FUND INSURANCE COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 29, 1953

CERTIORARI GRANTED APRIL 28, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 7

WILBURN BOAT COMPANY, ET AL., PETITIONERS,

vs.

FIREMAN'S FUND INSURANCE COMPANY

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FOR THE FIFTH CIRCUIT

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[fol. a 1]

[Caption omitted]

[fol. 2]

**IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS, SHERMAN
DIVISION**

Civil Action No. 503

WILBURN BOAT COMPANY, a corporation, doing business in Grayson County, Texas, and incorporated under the laws of the State of Oklahoma, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, residents of Grayson County, Texas, Plaintiffs,

vs.

FIREMAN'S FUND INSURANCE COMPANY, an insurance company doing business in Dallas County, Texas, and incorporated under the laws of the State of California, Defendant

PETITION FOR REMOVAL OF A CIVIL ACTION—Filed July 15,
1949

The Petition of Fireman's Fund Insurance Company, a corporation, Defendant in the above-entitled action, respectfully shows:

1. That an action of a civil nature was instituted by the Plaintiffs against the Petitioner in the 59th District Court of Grayson County, Texas, being Action Number 57400. Purported service of process was made upon the Petitioner on the 27th day of June, 1949.

2. That at the time said action was filed, the Plaintiff, Wilburn Boat Company, was a corporation organized and existing under the laws of the State of Oklahoma and not of the State of California, and upon information and belief still is so organized and existing, and that said Wilburn Boat Company is a citizen and resident of the State of Oklahoma and not of the State of California; that Glenn Wilburn, Frank Wilburn and Henry Wilburn, at the time said action was filed, were citizens and residents of the [fol. 3] State of Texas, and upon information and belief

still are citizens and residents of said State and not of the State of California.

3. That at the time said action was filed, and ever since, your Petitioner has been and still is a corporation organized and existing under the laws of the State of California and not of the State of Texas, nor of the State of Oklahoma, and was then, and still is, a citizen and resident of the State of California and not of the State of Texas, nor of the State of Oklahoma.

4. Said action is of a civil nature, in which there is a controversy between a citizen and resident of the State of Oklahoma, the said Wilburn Boat Company, a corporation, and citizens and residents of the State of Texas, the said Glenn Wilburn, Frank Wilburn and Henry Wilburn on the one hand, and on the other hand, a citizen and resident of the State of California, the Petitioner, Fireman's Fund Insurance Company, and the matter in controversy in such action, exclusive of interest and costs, exceeds the sum of \$3,000.00, to-wit: the Plaintiffs have alleged a purported contract of insurance in the amount of \$40,000.00, and allege a purported loss thereunder in the sum of \$40,000.00, with interest thereon at the rate of Six Per Cent (6%) per annum from May 23, 1949.

5. The only process, pleadings or orders in said action in the 59th District of Court of Grayson County, Texas, purporting to have been served upon your Petitioner are a Summons or Citation and a copy of Plaintiffs' Petition. True copies of said Summons or Citation and Plaintiff's Petition are filed in this Court, together with this Petition, [fol. 4] pursuant to the terms of Section 1446 of Title 28 of the United States Code.

6. The Petitioner files herewith a Bond, with good and sufficient surety, conditioned that the Petitioner will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that the same was not removable, or was improperly removed.

Wherefore, your Petitioner, Fireman's Fund Insurance Company, a corporation, prays that the Civil Action instituted by the Plaintiff against your Petitioner in the 59th District Court of Grayson County, Texas, as Act-on Number 57400, as aforesaid, be removed from that Court to the

District Court of the United States, for the Eastern District of Texas, Sherman Division.

J. A. Gooch, (S.) Edward B. Hayes, 135 South La-Salle Street, Chicago, Illinois. J. A. Gooch, Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Petitioner and Defendant.

* * * * *

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

[Title omitted]

REMOVAL BOND—Filed July 15, 1949

Know All Men By These Presents, that Fireman's Fund Insurance Company, a corporation, as Principal, and Fireman's Fund Indemnity Company, as Surety, are held and firmly bound unto Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, their heirs, executors, administrators and assigns, in the penal sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents, on the condition, nevertheless, that:

Whereas, the above-named Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, as Plaintiffs, heretofore brought a Civil Action in the 59th District Court of Grayson County, Texas, against said Principal, as Defendant, being Action No. 57400 in said Court; and

[fol. 6] Whereas, the said Principal is filing its Verified Petition in the District Court of the United States, for the District and Division in which said suit is pending, to-wit: the 59th District Court of Grayson County, Texas, to remove said suit to said District Court of the United States, in accordance with the provisions of Title 28, United States Code;

Now, therefore, the condition of this obligation is such

that if the Principal shall pay all costs and disbursements incurred by reason of said removal proceedings, should it be determined that the case was not removable, or was improperly removed, then this obligation shall be void; but otherwise it shall remain in full force and effect.

In witness whereof, the said principal has caused these presents to be executed by one of its duly authorized Attorneys of Record in this Court, and the said Fireman's Fund Indemnity Company has caused these presents to be signed by its Attorney in Fact, and its corporate seal to be affixed hereto, this 15th day of July, A. D. 1949.

Fireman's Fund Insurance Company, a corporation,
Principal, by J. A. Gooch, its duly authorized At-
torney of Record in this Court. Fireman's Fund
Indemnity Company, a corporation, Surety, by
Andrew K. Miller, Jr., its Attorney in Fact. (Seal)

[fol. 7] Attached Power of Attorney omitted.)

* * * * *

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF TEXAS, SHERMAN DIVISION

[Title omitted]

REMOVAL NOTICE—Filed July 15, 1949

To the Clerk of the District Court of the United States, for
the Eastern District of Texas, Sherman Division:

Attached hereto, for filing pursuant to the provisions of
Section 1446 of Title 28, United States Code, are true copies
of the Summons or Citation and Petition purported to have
[fol. 8] been served upon the Defendant in the Civil Action
instituted in the 59th District Court of Grayson County,
Texas, entitled: "Wilburn Boat Company, et al. vs. Fire-
man's Fund Insurance Company," Action Number 57400
in said Court.

J. A. Gooch, Edward B. Hayes, 135 South LaSalle
Street, Chicago, Illinois; J. A. Gooch, Cantey,
Hanger, Johnson, Scarborough & Gooch, Sinclair
Building, Fort Worth, Texas, Attorneys for Peti-
tioner and Defendant.

IN UNITED STATES DISTRICT COURT

ORIGINAL COMPLAINT—Filed June 18, 1949

Now come Wilburn Boat Company, a corporation duly incorporated under the laws of the State of Oklahoma, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, resident citizens of Grayson County, Company, a corporation duly incorporated under the laws of the State of California and with an office and place of business and agent upon [fol. 9] whom service may be had in the Wilson Building, in Dallas, Dallas County, Texas, and allege:

1

Plaintiffs show to the Court that on or about May 22, 1947, the defendant issued its insurance policy Number YA-28579, insuring the owners of a certain yacht called "The Wanderer" against loss or damage due to fire or other hazards, to the extent of \$40,000.00, and thereafter the plaintiffs herein, Glenn Wilburn, Frank Wilburn and Henry Wilburn, purchased said yacht and said policy was indorsed to protect them against loss or damage of or to said yacht. Thereafter an Oklahoma corporation was formed, to-wit, Wilburn Boat Company, and the title to said yacht was conveyed to said corporation, of which the said Glenn Wilburn, Frank Wilburn and Henry Wilburn were and at all times since its organization have been the sole stockholders. An application for indorsement on said policy to cover Wilburn Boat Company was made and issued by the defendant herein, although it inadvertently listed it as "Glenn, Frank and Henry Wilburn d b/a Wilburn's Boat Company."

At about 12:30 A. M. on the 25th day of February, 1949, while said policy was in full force and effect, a fire of unknown origin was discovered on said yacht and said fire caused damage to said yacht to the extent of \$75,000.00.

The plaintiffs herein have duly complied with all of the provisions of said policy and all conditions precedent, including the furnishing of proof of loss to the defendant, [fols. 10-11] but the defendant has denied all liabilities for the payment of the damages involved in said fire.

Wherefore, plaintiffs pray that upon trial of this case

they have judgment against the defendant, Fireman's Fund Insurance Company, for the sum of \$40,000.00, with interest at the rate of 6% per annum from May 23, 1949, and for all other relief, general or special, to which they may be entitled.

(S.) Alexander Gullett, Gullett & Gullett, Attorneys at Law, Security Building, Denison, Texas; (S.) Hobert Price, Strasburger, Price, Holland, Kelton & Miller, 300 Gulf States Building, Dallas 1, Texas, Attorneys for plaintiffs:

Citation and sheriff's return (omitted in printing).

[fol. 12] IN UNITED STATES DISTRICT COURT

REMOVAL NOTICE—Filed July 15, 1949

To Alexander Gullett (Gullett & Gullett) Security Building, Denison, Texas; Hobert Price (Strasburger, Price, Holland, Kelton & Miller) 300 Gulf States Building, Dallas 1, Texas, Attorneys for Plaintiffs:

Please take notice that we have this 15th day of July, A. D. 1949, filed a Petition in this Court in behalf of the Defendant, Fireman's Fund Insurance Company, for removal of the action now pending in the 59th District Court of Grayson County, Texas, entitled: "Wilburn Boat Company et al. vs. Fireman's Fund Insurance Company," Action Number 57400, to this Court; and

Further take notice that we have at the same time filed in this Court a Bond, with good and sufficient surety, conditioned that the aforesaid defendant, Fireman's Fund Insurance Company, will pay all costs and disbursements incurred by reason of the removal proceeding, should it be determined that the case was not removable, or improperly removed, and at the same time have filed in this Court copies of the Summons or Citation purported to have been served upon the aforesaid Defendant in said action.

Further take notice that we filed a copy of said Petition for Removal, this date, with the Clerk of the 59th District Court of Grayson County, Texas.

[fol. 13] Copies of said Petition for Removal and Removal bond are attached to this Notice and herewith served upon you.

(S.) J. A. Gooch, Edward B. Hayes, J. A. Gooch, Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Petitioner and Defendant.

(Copies of Petition for Removal and Removal Bond, are omitted).

[fol. 14] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION

[Title omitted]

AFFIDAVIT AS TO SERVICE OF NOTICE TO CLERK, 59TH DISTRICT COURT OF GRAYSON COUNTY, TEXAS—Filed July 15, 1949

STATE OF TEXAS,

County of Tarrant, ss:

Nat. J. Harben, being first duly sworn, on oath deposes and says that he is one of the Attorneys for the Defendant in the above-entitled action; that on July 15, 1949, he filed with the Clerk of the 59th District Court of Grayson County, Texas, a true copy of the Petition for Removal of a Civil Action heretofore filed in this Court on July 15, 1949, in accordance with the provisions of Section 1446 of Title 28, United States Code.

Nat. J. Harben.

[fol. 15] (Acknowledgement Omitted.)

Subscribed and Sworn to before me this 15th day of July,
A. D. 1949.

James P. Riley, Notary Public.

(Seal)

IN UNITED STATES DISTRICT COURT

STIPULATION FOR EXTENSION OF TIME TO FILE MOTIONS AND ANSWER—Filed July 15, 1949

Whereas, the within proceeding was filed in the 59th District Court of Grayson County, Texas, entitled Wilburn Boat Company et al. vs. Fireman's Fund Insurance Company, being Cause No. 54700, and defendant having filed removal papers herein to remove said case to the District Court of the United States for the Eastern District of Texas, Sherman Division, and said papers having been filed on July 15, 1949; and

Whereas, defendant's time to appear and answer herein or to file any defensive motions will expire on July 20, 1949, and defendant being unable to prepare its answer and defense in said cause within the aforesaid time has requested an extension of time to answer or file any defensive motions, or otherwise move, to and including August 10, 1949, and [fol. 16] plaintiffs having agreed to such extension of time:

It Is, Therefore, Stipulated and Agreed by and between the attorneys for the plaintiffs and attorneys for the defendant that defendant's time to answer or file any defensive motions, or otherwise move, in the within entitled proceeding be and is hereby extended to and including August 10, 1949.

It is further agreed that this agreement is without prejudice to plaintiff's right to file any motions herein with respect to the removal of said cause to the United States District Court and is without prejudice to defendant's right to file any motions herein.

It is further agreed that this agreement is subject to ap-

proval of the Court, and both parties move that the Court approve this agreement.

Dated: July 15, 1949.

Gullett & Gullett, By (S.) Alexander Gullett, Security Building, Denison, Texas, one of the attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By (S.) J. A. Gooch, 1500 Sinclair Building, Fort Worth 2, Texas, Attorneys for Defendant.

[fol. 17] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING MOTIONS AND ANSWER—
July 15, 1949

Defendant, Fireman's Fund Insurance Company, having moved this Court by and through its attorneys, Cantey, Hanger, Johnson, Scarborough & Gooch, for an order extending defendant's time to file its answer or make any motions, or otherwise move, in the above entitled proceeding, to and including August 10, 1949, and the Court having read the agreement entered into by and between the attorneys for defendant and plaintiffs, wherein it is agreed that said extension of time be granted, and said agreement having been filed among the papers in this proceeding, and the Court being of the opinion that said motion should be granted:

It Is, Therefore, Ordered that the time for defendant, Fireman's Fund Insurance Company, to file its answer and any defensive motions, or otherwise move in the within and entitled proceeding, be and hereby is extended to and including August 10, 1949; and

It Is Further Ordered that the aforesaid extension of time shall be without prejudice to plaintiffs' right to file any motions herein with respect to the removal of said case to the United States District Court and is without prejudice to defendant's right to file any motions herein.

[fol. 18] Done at Sherman, Texas, July 15, 1949.

(S.) Randolph Bryant, United States District Judge.

Approved as to Form and Substance: Gullett & Gullett,
By (S.) Alexander Gullett, Security Building, Denison,

cas, One of the Attorneys for the Plaintiffs. Cantey, Manager, Johnson, Scarborough & Gooch, By (S.) J. A. Gooch, 1500 Sinclair Building, Fort Worth 2, Texas, Attorneys for Defendant.

1. 19] IN UNITED STATES DISTRICT COURT

(Title Omitted)

SECOND STIPULATION FOR EXTENSION OF TIME TO FILE
MOTIONS AND ANSWER—Filed Aug. 5, 1949

Whereas, the within proceeding was filed in the 59th District Court of Grayson County, Texas, entitled Wilburn et al. Company et al. vs. Fireman's Fund Insurance Company, being Cause No. 57400, and defendant having filed removal papers herein to remove said case to the District Court of the United States for the Eastern District of Texas, Sherman Division, and said papers having been filed July 15, 1949; and

Whereas, defendant's time to appear and answer herein to file any defensive motions was heretofore extended by agreement and order of the Court to and including August 10, 1949, and defendant having been unable to complete investigation of said case and being unable to file its answer on or before August 10, 1949, has requested another extension of time to prepare and file any defensive motions to its answer herein to and including August 25, 1949, and on July 20] plaintiffs having agreed to said extension of time:

It is, Therefore, Stipulated and Agreed by and between attorneys for the plaintiffs and attorneys for the defendant that defendant's time to answer or file any defensive motions, or otherwise move, in the within entitled proceeding be and is hereby extended to and including August 25, 1949.

It is further agreed that this agreement is without prejudice to plaintiff's right to file any motions herein with respect to the removal of said case to the United States District Court and is without prejudice to defendant's right to file any motions herein.

It is further agreed that this agreement is subject to

approval of the Court, and both parties move that the Court approve this agreement.

Dated: August 5, 1949.

Gullett & Gullett, By Alexander Gullett, Security Building, Denison, Texas, one of the attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By Nat J. Harben, 1500 Sinclair Building, Fort Worth 2, Texas, Attorneys for Defendant.

fol. 21] IN UNITED STATES DISTRICT COURT

SECOND ORDER EXTENDING TIME FOR FILING MOTIONS AND ANSWER—August 5, 1949

Defendant, Fireman's Fund Insurance Company, having moved this Court by and through its attorneys, Cantey, Hanger, Johnson, Scarborough & Gooch, for an order extending defendant's time to file its answer or make any motions, or otherwise move, in the above entitled proceeding, to and including August 25, 1949, and the Court having read the agreement entered into by and between the attorneys for defendant and plaintiffs, wherein it is agreed that said extension of time be granted, and said agreement having been filed among the papers in this proceeding, and the Court being of the opinion that said motion should be granted:

It Is, Therefore, Ordered that the time for defendant, Fireman's Fund Insurance Company, to file its answer and any defensive motions, or otherwise move in the within entitled proceeding, be and hereby is extended to and including August 25, 1949; and

It Is Further Ordered that the aforesaid extension of time shall be without prejudice to plaintiffs' right to file any motions herein with respect to the removal of said case to the United States District Court and is without prejudice to defendant's right to file any motions herein.

[fol. 22] Done at Sherman, Texas, August 5, 1949.

(S.) Rudolph Bryant, United States District Judge.

Approved as to Form and Substance: Gullett & Gullett, (Alexander Gullett), Denison, Texas, One of the Attorneys for the Plaintiffs. Cantey, Hanger, Johnson, Scarborough & Gooch, By Nat J. Harben, 1500 Sinclair Building, Fort Worth 2, Texas, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 24, 1949

Now comes Fireman's Fund Insurance Company, a corporation, defendant herein, and, answering the petition of the plaintiffs heretofore filed in the above-entitled action, says:

1. In answer to the first literary paragraph of that portion of the petition designated "1", defendant admits that [fol. 23] on or about May 22, 1947, it issued its marine hull insurance policy Number YA-28579 in the amount of \$10,000.00 in favor of Robert D. Marshall and John Shuler as their respective interests may appear as owners of a certain yacht called "Wanderer," a vessel of the United States of America, Official Number 231,171, but states that the risks insured against were only those risks specified in said policy or contract of insurance and subject to the terms, conditions, declarations and stipulations therein stated and set forth and not otherwise; that said policy originally provided that it was warranted by the assured that the vessel be confined to the Yacht Harbor, Greenville, Mississippi; that said waters are part of the navigable waters of the United States of America; that by amendment effected by an indorsement or rider attached to the fact of said policy dated July 2, 1948, it was provided among other things that it was warranted by the assured that the vessel be confined to Lake Texoma; that said waters are part of the navigable waters of the United States of America; that said policy of insurance provided in part as follows: "Not valid unless countersigned by a duly authorized Agent of the Company"; that said policy of insurance and all indorsements or riders thereto, including all indorsements or riders hereinafter more specifically referred to, were issued by the defendant at Chicago, Illinois, and countersigned in accordance with the provision above stated at Rock Island, Illinois, and were delivered in each instance to the named assured at Rock Island, Illinois.

By amendment effected by an indorsement or rider attached to the face of said policy dated July 2, 1948, among [fol. 24] other things the assured under said policy was changed as follows: "Effective June 9, 1948, it is understood and agreed that the name and address of the Assured hereunder is amended to read: Frank and Henry Wilburn d/b/a Wilburn Bros. Denison, Texas."

By amendment effected by an indorsement or rider attached to the face of said policy dated August 16, 1948, among other things the assured under said policy was changed as follows: "Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read: Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company."

Subsequently, to wit: on or about the 14th day of December, 1948, the named assured by their duly authorized agent thereunto represented to the defendant that said named assured had an investment of \$4,000.00 in said vessel and requested insurance in the additional amount of \$30,000.00. By reason of said representation and in reliance thereon, by amendment effected by an indorsement or rider attached to the face of said policy dated December 20, 1948, the amount of insurance coverage under said policy was changed as follows: "In consideration of an additional premium of \$234.01 it is understood and agreed that the amount of insurance hereunder is increased to \$40,000.00." Upon information and belief defendant avers that at no time here in question did the plaintiffs or any of them have an investment of \$40,000.00 in said vessel but that the total investment that the plaintiffs or any of them had in said vessel at any time here in question was in a total amount greatly less than \$40,000.00, which said amount is peculiarly within the knowledge [fol. 25] of the plaintiffs.

Except as herein expressly admitted the averments of the first literary paragraph of that portion of the petition designated "1" are denied.

2. In answer to the second literary paragraph of that portion of the petition designated "1", defendant admits that said yacht was damaged by fire on or about the 25th day of February, 1949. Except as herein expressly admitted, the averments of said second literary paragraph of said portion of the petition are denied.

3. In answer to the third literary paragraph of that portion of the petition designated "1", defendant denies that the plaintiffs have duly complied with all of the provisions of said policy issued as aforesaid, denies that the plaintiffs have duly complied denies that the plaintiffs have furnished the defendant with a sworn proof of loss as required by the terms and conditions of said policy.

Further answering, defendant states that the named assured in the policy of insurance sued upon herein rendered said policy null and void in each of the following separate and several instances:

(A). Defendant avers that among other things said policy expressly provides:

"It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent [fol. 26] sent in writing of the Assurers."

As hereinbefore stated, effective August 6, 1948, the named assured under the policy sued upon was Boat Company. Upon information and belief, defendant avers that subsequently, to-wit: on or about September 24, 1948, said Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company transferred and sold all their right, title and interest in said vessel to Wilburn Boat Company, a corporation organized and existing under the laws of the State of Oklahoma. Upon information and belief, defendant further avers that on or about August 4, 1948, Wilburn Brothers Boat Company by J. — Wilburn and J. F. Wilburn transferred said yacht "Wanderer" to The Citizens National Bank of Denison, Texas, a corporation, as security for an indebtedness in the amount of \$10,000.00 as evidenced by a certain promissory note dated August 4, 1948, and that subsequently, to-wit: on or about October 21, 1948, Wilburn Brothers Boat Company, a corporation suing herein as the plaintiff Wilburn Boat Company, a corporation, transferred said yacht "Wanderer" to The Citizens National Bank of Denison, Texas, a corporation, as evidenced by a certain chattel mortgage dated October 21, 1948, which said chattel mortgage recites among other things as follows:

"It is hereby understood and agreed that this mortgage and note described herein are given in renewal and extension of a certain mortgage and note dated August 4, 1948, in the amount of \$10,000.00 payable ninety days from date, signed Wilburn Brothers Boat Company by J. — Wilburn, and J. F. Wilburn.";

[fol. 27] That the consent of the defendant was not asked and was not given to any of the transactions hereinbefore stated or to any sale, assignment, transfer or pledge of the interest insured by said policy; that said policy expressly provides as aforesaid that upon such sale, assignment, transfer or pledge it is agreed that this insurance is void. Defendant is now advised and therefore states that in the premises the said policy was void at the time of the alleged loss. Defendant further shows that the fact that the named assured did sell the interest insured to the Wilburn Boat Company, a corporation, was material to the risk and hazard assumed by the defendant (as also appears from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void. Defendant further shows that the fact that the interest insured was transferred as security for a certain indebtedness to The Citizens National Bank of Denison, Texas, a corporation, was material to the risk and hazard assumed by the defendant (as also appears from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void.

(B). Defendant avers that among other things said policy expressly provides:

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorsement hereon."

[fol. 28] Upon information and belief, defendant further avers that the plaintiffs Glenn Wilburn, Frank Wilburn and Henry Wilburn purchased the yacht "Wanderer" at Greenville, Mississippi on or about June 8, 1948, for the consideration of \$9,000.00; that subsequently said yacht was brought

by said plaintiffs via the Mississippi and Red Rivers to Lake Texoma for the commercial purposes; that certain repairs and modifications were then made thereon for the express purpose of operating said yacht for commercial purposes; that the plaintiff Wilburn Boat Company, a corporation, was organized for the express purpose of operating said yacht for commercial purposes; that the articles of incorporation of said corporation verified the 10th day of July, 1948, provided among other things as follows:

“Article Four:

“The purposes for which this corporation is formed are:

“Buy, own, lease, mortgage and sell real and personal property necessary to carry on business of corporation; and to operate an excursion boat for purpose of hauling mail, freight and passengers to and from all sites and concessions designated by Regional Director of National Park Service on shores of Lake Texoma, and to render additional service to towing, winching, and salvaging and repairing boats.”; that the plaintiffs entered into and set up certain charters for the commercial use of said yacht. Defendant did not consent thereto and did not consent to the use of said vessel [fol. 29] for any commercial purpose whatsoever. Defendant is advised and therefore states that in the premises the said policy was void at the time of the alleged loss. And defendant further shows that the fact that said yacht was chartered and not used solely for private pleasure purposes was material to the risk and hazard assumed by the defendant (as also appears from the express terms and conditions of said policy) but was not disclosed to defendant and that by reason of said premises, said policy of insurance was thereby rendered null and void.

(C). Defendant avers that among other things said policy expressly provides:

“This Entire Policy shall be void if the Assured has concealed or misrepresented any material fact subject thereof, or, in case of fraud or false swearing insurance or the subject thereof; whether before or by the Assured touching any matter relating to this after a loss.”

Defendant hereby refers to and hereby incorporates subparagraphs (A) and (B) hereof with the same force and effect as though here repeated. Defendant further avers that the transactions and matters therein stated and referred to were concealed by the plaintiffs and were not disclosed to the defendant; that the defendant had no knowledge of any of said transactions or matters or of any of the facts pertaining thereto until after the date of the alleged loss.

Further answering, defendant says that as soon as it received notice of the transactions and matters hereinbefore [fol. 30] referred to, defendant notified the named assured by registered mail posted on or about May 12, 1949, that by reason of the aforesaid premises among other things said policy was rendered null and void and accompanied such notification with a tender of the full and entire premium paid by the named assured for said policy.

Wherefore, defendant says that by reason of the aforesaid premises said policy of insurance was null and void at the date of the alleged loss and that the plaintiffs have no rights thereunder and defendant prays that plaintiffs' petition should be dismissed at plaintiffs' costs.

J. A. Gooch, 1500 Sinclair Bldg., Ft. Worth, Texas.
Edward B. Hayes, 135 South La Salle Street, Chicago, Illinois. (Not Signed), Cantey, Hanger, Johnson, Scarborough & Gooch, Sinclair Building, Fort Worth, Texas, Attorneys for Defendant.

[fol. 31] IN UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF TEXAS, SHERMAN DIVISION

Civil Action No. 503

WILBURN BOAT COMPANY, a corporation, et al., Plaintiffs,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a corporation, De-
fendant

JUDGMENT—December 13, 1951

This cause came on regularly to be heard in open Court by the Court, Honorable Randolph Bryant presiding on December 28th, 1949. All parties announced ready for trial and the case proceeded to trial before the Court without a jury on the pleadings, exhibits, evidence and arguments of counsel, at the conclusion of which the Court invited the respective parties to submit written briefs concerning their respective contentions.

Thereafter, and pending the preparation of briefs, the trial proceedings were transcribed by the Official Court Reporter under certificates of January 4th, 1950, and February 18th, 1950, said transcript of trial proceedings being furnished to the Court and to counsel for the respective parties. Thereafter, the defendant, Fireman's Fund Insurance Company, a corporation, filed its brief entitled "Memorandum for Defendant" and, at a later date, the plaintiffs, Wilburn Boat Company, a corporation, and Glenn, Frank and Henry Wilburn, filed their brief entitled "Plaintiffs' Reply Brief". [fol. 32] Upon consideration of the pleadings, exhibits, evidence, arguments of counsel, transcript of trial proceedings and briefs filed by the respective parties, the Court thereafter, on December 28th, 1950, made its findings of fact and conclusions of law, same being in words, characters and figures as follows:

“United States District Court, Eastern District of Texas

Sherman, Texas, December 28, 1950.

Randolph Bryant, U. S. District Judge,

“Lord Bissell & Kadyk, Attorneys at Law, 135 S. LaSalle St., Chicago 3, Ill.

Honorable Joe A. Keith, Attorney at Law, Sherman, Texas.

Gullett & Gullett, Attorneys at Law, Denison, Texas.

Strasburger Price Holland, Kelton & Miller, Gulf States Bldg., Dallas, Texas.

Honorable T. G. Schirmeyer, Gulf Bldg., Houston, Texas.

“Re: Civ. 503 Sherman Division Wilburn Boat Company

v.

Fireman's Fund Insurance Company

“Gentlemen:

“After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract [fol. 33] and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States.

“Since the policy contained an express provision ‘that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred pledged without the previous consent in writing of the assurers’, and since it is admitted that the assureds were Glenn, Frank and Henry Wilburn, and that they did assign their interest in the vessel to an Oklahoma corporation, and since it is further admitted that they pledged the vessel to the Denison bank, a failure of performance of the terms of the contract is indisputably shown, and for such reason they are not entitled to recover.

“Further, it was warranted by the assureds that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorse-

ment hereon'. The record shows without dispute, that this warranty was violated and that no permission was ever granted by indorsement on the policy for use other than for private pleasure purposes.

'I think that the authorities are clear to such effect. Aetna Insurance Company vs. Houston Oil and Transport Company, 49 F. 2d 121 at page 124; Imperial Fire Insurance Company vs. Coos County, 151 U. S. 452; Union Fish Company vs. Erickson, 248 U. S. 308 at page 313.

[fol. 34] "Inasmuch as the above findings, in my opinion, are determinative of the issues in this case, I do not think it is necessary to make any other findings of fact, and attorneys for the defendant may prepare findings of fact and conclusions of law in accordance with the above, as well judgment pursuant thereto, furnishing attorneys for plaintiffs with a copy of such proposed findings, conclusions and judgment.

Yours very truly, (S.) Randolph Bryant".

Said findings and conclusions were sent to each of the addressees named therein, said addressees being all of the attorneys for the respective parties herein, and were also filed by the Judge with the Clerk, all on December 28, 1950.

Thereafter, on or about the 24th day of April, 1951, the Honorable Randolph Bryant died. The undersigned is the successor to the Honorable Randolph Bryant and is the Judge regularly sitting in and assigned to the Court in which this action was tried.

Upon consideration of the record, it is the opinion should be rendered against the plaintiffs and in favor of the defendant.

It is, therefore, Ordered, Adjudged, and Decreed by the Court that the plaintiffs, Wilburn Boat Company, Glenn Wilburn, Frank Wilburn and Henry Wilburn, do have and recover nothing of and from the defendant, Fireman's Fund Insurance Company, a corporation; that the whole of the complaint herein be, and it is hereby, dismissed; and that the costs hereof be, and they are hereby, taxed against said plaintiffs, for which let execution issue.

[fol. 35] Dated this 13th day of December, 1951.

(S.) Joe W. Sheehy, Judge.

Filed Dec. 13, 1951.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed December 20, 1951

Notice is hereby given that the plaintiffs herein, Wilburn Boat Company, a corporation and Glenn Wilburn, Frank Wilburn and Henry Wilburn, hereby appeal to the United States Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on December 13, 1951.

Gullett & Gullett, Citizens Bank Building, Denison, Texas; Hobert Price, 300 Gulf States Building, Dallas 1, Texas; Theodore G. Schirmeyer, 2801 Gulf Building, Houston 2, Texas, by Alexander Gullett, Attorneys for Plaintiffs and Appellants.

[fol. 36] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed
December 20, 1951

Come now the appellants, Wilburn Boat Company, a corporation, and Glenn Wilburn, Frank Wilburn and Henry Wilburn, and designate as the record of this case on appeal the complete record and all the proceedings and evidence in the action.

Gullett & Gullett, Citizens Bank Building, Denison, Texas; Hobert Price, 300 Gulf State Building, Dallas 1, Texas; Theodore G. Schirmeyer, 2801 Gulf Building, Houston 2, Texas, by Alexander Gullett, Attorneys for Plaintiffs and Appellants.

CERTIFICATE OF SERVICE—(Omitted in Printing)

[fol. 37] Bond on Appeal for \$250.00, filed December 26, 1951—omitted in printing.

[fol. 38] IN UNITED STATES DISTRICT COURT

ORDER AS TO ORIGINAL EXHIBITS—January 11, 1952

The Court being of the opinion that the original exhibits which were introduced in evidence upon the trial of this cause should be sent to the Appellate Court in lieu of copies, It Is Therefore Ordered that the original exhibits in this cause be sent by Registered Mail, in their original form, to the Clerk of the Court of Appeals for the Fifth Circuit, in New Orleans. It Is Further Ordered that such exhibits be mailed or sent along with the record in this case. When [fol. 39] the appeal in this case has been finally disposed of, then the original exhibits shall be returned to the Clerk of the United States District Court, at Sherman, Texas, in order that they may be delivered to the parties for whom they were introduced in evidence.

Entered this 11 day of January, A. D. 1952.

(S.) Joe W. Sheehy, United States District Judge.

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF TEXAS, SHERMAN DIVISION

[Title omitted]

TRANSCRIPT OF TRIAL PROCEEDINGS—Filed January 11, 1950

APPEARANCES

For the Plaintiffs:

Mr. Hobart Price, Dallas, Texas.

Gullett & Gullett, Denison, Texas, by Messrs. Alexander Gullett and Charles S. Gullett.

[fol. 40] For the Defendant:

Mr. Joe A. Keith, Sherman, Texas.

Mr. Edward B. Hayes, Chicago, Illinois.

CASE CALLED FOR TRIAL

Be It Remembered, that upon the 28th day of December, A. D. 1949, came on to be heard the above entitled and num-

bered cause before His Honor, Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, situated and holding Regular Session in the City of Sherman, Texas; and,

That the following is a substantially true and correct transcript of the evidence and proceedings had during the trial of said cause, with the exception that Plaintiffs' Exhibit 4, being a deposition, is omitted herefrom at the request of counsel.

STIPULATION OF FACTS, ETC.

It is stipulated between the parties that the Boat Wanderer was not used solely for private pleasure purposes during its ownership from time to time by the several plaintiffs herein, but on the contrary said boat was purchased with the intention of being chartered and used for hire, was remodeled and reequipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by J. F., J. H., and L. G. Wilburn until it sank as the result of being burned by fire on February 25, 1949. During January, 1949, the boat was damaged as the result of a storm. It was taken from its regular mooring at Burns Run Resort to Lake [fol. 41] Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. After being so returned to Burns Run Resort the boat was not thereafter used for any purpose until it sank as the result of being burned by fire on February 25, 1949.

It is further stipulated by the parties that on June 3, 1948, the plaintiffs, J. F., J. H., and L. G. Wilburn, borrowed \$10,000.00 from the Citizens National Bank of Denison, Grayson County, Texas, executing their negotiable promissory note in favor of said bank. Thereafter, on August 4, 1948, Wilburn Bros. Boat Company, acting by J. F. Wilburn and J. H. Wilburn borrowed an additional \$10,000.00 from said bank, executing their negotiable 90 day promissory note therefor, being Exhibit 1 attached to this stipulation.

The boat involved in this case, the Wanderer, was pledged

to said bank by said Wilburn Bros. Boat Company, acting as aforesaid, by chattel mortgage of August 4, 1948, being Exhibit 2 attached to this stipulation.

On October 4, 1948, a negotiable 90 day promissory note for \$10,000.00 was given to said bank, signed "Wilburn Boat, Inc." by J. H. Wilburn, being in renewal and extension of the above mentioned note of August 4, 1948. Said note of October 4, 1948, is Exhibit 3 attached to this stipulation.

[fol. 42] On October 21, 1948, the boat was pledged to said bank by chattel mortgage of said date, signed "Wilburn Bros. Boat Company, a Corporation, by L. G. Wilburn, President, J. F. Wilburn, Secretary", such chattel mortgage being Exhibit 4 of this stipulation.

On October 25, 1948, "Wilburn Bros. Boat Company, a Corporation" acting by L. G. Wilburn, President and J. F. Wilburn, Secretary, executed a negotiable one year promissory note in favor of J. F. Wilburn and J. H. Wilburn for \$8,000.00, being Exhibit 5 attached to this stipulation.

On the same date "Wilburn Bros. Boat Company, a Corporation", acting as aforesaid, pledged said boat to said J. F. Wilburn and J. H. Wilburn by chattel mortgage of said date, being Exhibit 6 attached to this stipulation.

The indebtedness of \$20,000.00 to said bank and of \$8,000.00 to J. F. Wilburn and J. H. Wilburn, above mentioned, were unpaid at the time the boat sank as a result of being burned by fire on February 25, 1949, and the chattel mortgages above mentioned had not been released at said time but were in full force and effect.

The indebtednesses and pledges hereinabove mentioned were created and made without the consent of the defendant.

On May 12, 1949, the defendant Firemen's Fund Insurance Company tendered to Glen, Franklin and Henry Wilburn, DBA Wilburn Boat Company, Denison, all premiums paid to the defendant under the policy involved in this case [fol. 43] from the time that the boat Wanderer was purchased by said J. F., J. H., and L. G. Wilburn. This tender was refused on May 19, 1949, without objection to the form or sufficiency of the tender.

It is further stipulated that the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, has never had and

does not now have a permit to do business in the State of Texas.

The Boat Wanderer was purchased by the plaintiffs, J. F. Wilburn, J. H. Wilburn and L. G. Wilburn by bill of sale of June 9, 1948, for a cash consideration of \$9,000.00, said bill of sale being Exhibit 7 of this stipulation.

The ownership of said boat remained unchanged until September 24, 1948, at which time it was sold and transferred by the plaintiffs, J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, to the plaintiff Wilburn Boat Company, a Corporation, by bill of sale of said date, reciting a consideration of \$9,000.00, such bill of sale being Exhibit 8 to this stipulation.

It is further stipulated that all of the stock of the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, was owned by the plaintiffs J. F. Wilburn, J. H. Wilburn and L. G. Wilburn.

It is further stipulated that all exhibits attached to this stipulation shall be considered as forming a part of the record in this case.

(In accordance with the last paragraph of above stipulation the exhibits introduced and marked and which were to be attached to said stipulation are hereinafter shown on the following pages:

[fol. 44]

STIPULATION EXHIBIT 1

Denison, Texas, August 4, 1948.

Ninety . . . days after date, without grace, for value received, I, we, or either of us promise to pay to the order of The Citizens National Bank of Denison, Denison, Texas \$10,000.00, Ten Thousand and 00/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of five per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any

of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney for collection, or if it is collected through a bankrupt Court, a probate Court, or any other Court, then an additional ten per cent on the principal and interest shall be added as attorney's fees for collection.

Address. Wilburn Brothers Boat Company.

By (S.) J. H. Wilburn, (S.) J. F. Wilburn.

Due 10-4-8.

No. A13848.

CM "Wanderer"

Written in ink across note: Renewed.

[fol. 45]

STIPULATION EXHIBIT 2

The State of Texas,
County of Grayson.

Know All Men By These Presents:

That I. Wilburn Brothers Boat Company By J. H., J. F. and L. G. Wilburn of Grayson County, Texas, hereinafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by The Citizens National Bank of Denison, Denison, Texas, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bargained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all live-stock, give number, kind, age and brand).

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is free of all liens and claims and is located on Lake Texoma.

together with all of the increase of, from and to, the above described property, prior to the full payment of the in-

debtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full, save and except such livestock as may be herein especially reserved.

[fol. 46] To Have And To Hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part hereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by One certain promissory note, as follows: one note dated August 4, 1948 due Ninety days from date for \$10,000.00 and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same shall stand secured by and payable under this mortgage with the other indebtedness herein mentioned, provided, however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described property to secure the note, or notes, above named and described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the prop-

erty above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgager the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself, at his own expense, to provide with food, pasturage and attention, and to give the same all of the attention which the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of \$— at the execution and delivery hereof.

[fol. 48] It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without the consent of the bank should surrender possession of any of said property or sell any part thereof, or if

the mortgagor should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enforce collection thereof in the same manner as if the full time for the maturity of the same had lapsed. In the event that more than one note is secured by this mortgage, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to [fol. 49] the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisalment. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the securing, taking and caring for any property above described or the gathering and marketing of any crops shall be borne by said mortgagor and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be canceled and released at the expense of the mortgagor. The taking of this mortgage shall not waive or impair any other security said bank may have or hereafter acquire for the payment of the above indebtedness nor shall the taking of any such additional security waive or impair this mortgage, but said bank may resort to any security it may have in the order it may see proper.

A bill of sale hereunder from the said bank or any of its agents, officers, attorneys, or assigns, as such, conveying the said property or any part thereof, shall be fully and conclusive evidence and proof that all of the terms, conditions

[fol. 50] and prerequisites required herein have been fully complied with; and said mortgagor hereby ratifies and confirms any and all acts of the said bank, its officers, agents, attorneys and assigns, done under and by virtue hereof.

It is further agreed and stipulated between the parties hereto that in the event the bank should exercise its option to declare all of the indebtedness above referred to, immediately due and payable and proceed at once to enforce collection thereof, in the same manner as if the full time for the maturity of the same had elapsed, by reason of any of the foregoing actions on the part of the mortgagor, that then, and in that event, by the term "indebtedness" is meant the full amount of the principal and interest due by the mortgagor at the time that the bank exercises such option. In no event shall the bank collect or attempt to collect any unearned interest on said indebtedness at the time that the bank so exercises such option to declare said indebtedness due, but all interest included in the face amount of the note applicable to a period after the accelerated maturity shall constitute a credit against the face amount of the note, and all interest paid in advance and applicable to a period after the accelerated maturity shall constitute a credit on the amount of indebtedness, as above defined, then lawfully owing on such note.

Erasures and interlineations made and approved before signing.

[fol. 51] Witness our hands this the 4th day of August, A. D. 1948.

Wilburn Brothers Boat Company, by (S.) J. H. Wilburn, J. F. Wilburn, L. G. Wilburn.

Executed and delivered in the presence of the undersigned:

Note: None of reversed side is filled in, therefore omitted by reporter.

• • • • •

STIPULATION EXHIBIT C

Denison, Texas, October 4, 1948.

Ninety days after date, without grace, for value received, I, we or either of us promise to pay to the order of The Citizens National Bank of Denison of Denison \$10,000.00 Ten Thousand and no/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of 5 per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and [fol. 52] agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney, for collection, or if it is collected through a Bankrupt Court, a Probate Court, or any other Court, then an additional ten per cent of the principal and interest shall be added as attorney's fees for collection.

Address.

(S.) Wilburn Boat Inc., by J. H. Wilburn.

No. A15207.

Written in ink across note: Renewed.

Separate Collateral Agreement

The undersigned, for a valuable consideration, agree with Citizens National Bank of Denison, as follows:

For the purpose of securing said Bank in the payment of all indebtedness now owing to it or which may hereafter become owing to it by the undersigned or by or by any of all of such parties, the undersigned hereby pledge, transfer and deliver to said Bank the following securities, to-wit:

Renewal—note #13848.

Attached to this note.

Collateral unchanged.

[fol. 53] The undersigned further agree with said Bank as follows:

That any and all securities or other property heretofore, now or hereafter pledged or delivered by any of the under-

signed to said Bank to secure any indebtedness to said Bank, shall be held and construed to be pledged hereunder and as if fully described herein, and may be held by said Bank as security for any and all debts and obligations of any or all of undersigned to said Bank for the payment of money, whether such debts, liabilities and obligations now exist or are hereafter incurred or arise and whether the obligation or liability thereon of the undersigned or any of them be direct, contingent, primary, secondary, joint, several, joint and several, or otherwise, and whether such obligations be of the same character or different.

That this pledge shall be in no wise affected by any indulgence or indulgencies, extension or extensions, change or changes in the form, evidence, maturity, rate of interest or otherwise of any of the debts or obligations secured under, or assigned by, this instrument, nor by want of presentment, notice, protest, suit or indulgence upon any of such obligations secured under, or assigned by this instrument.

That, upon failure of any party to keep and perform any agreement herein contained or otherwise made with said Bank, or in case of the insolvency or failure in business of any party whose obligation to the Bank is secured in whole or in part hereunder, said Bank may, at its option, at once mature all debts and liabilities hereby secured.

[fol. 54] That, if the securities at any time held in pledge hereunder shall decline in value, the undersigned will, on demand, forthwith make payment of the debts and obligations then secured hereby or deposit additional securities under this pledge to the satisfaction of said Bank.

That, upon failure to keep and perform any agreement herein contained, said Bank is authorized and empowered, without either demand, advertisement or notice of any kind, to sell at public or private sale, the whole or any part of the securities then held by it in pledge hereunder, and transfer and deliver same to the purchaser or purchasers thereof, and receive the proceeds of sale. Said Bank to have the same right to purchase at said sale as a stranger. Sale or part of securities held in pledge hereunder shall not exhaust this power of sale, but sales may be made from time to time until all securities are sold, or debts and liabilities hereby secured paid in full. Said Bank shall receive the proceeds

of such sale or sales, which shall be paid and accredited on said debts and liabilities then secured hereby, said Bank to have option of application thereof. Any surplus after payment in full of said debts and liabilities to be paid to undersigned.

This instrument and all rights and powers hereunder, together with the securities then held in pledge hereunder, may be transferred and assigned by said Bank at such time and upon such terms as it may deem advisable; and such assignee shall succeed to all the rights and powers of said Bank hereunder.

(S.) Wilburn Boat Co., by J. H. Wilburn.

[fol. 55]

STIPULATION EXHIBIT 4

THE STATE OF TEXAS,

County of Grayson:

Know All Men by these Presents:

That I, Wilburn Brothers Boat Company, a corporation of Grayson County, Texas, hereafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by The Citizens National Bank of Denison, Denison, Texas, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bargained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all livestock, give number, kind, age and brand.)

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is free of all other liens and claims and is located on Lake Texoma.

It is hereby understood and agreed that this mortgage and note described herein are given in renewal and extension of a certain mortgage and note dated August 4, 1948,

in the amount of \$10,000.00 payable Ninety days from date, signed by Wilburn Brothers Boat Company with J. H. Wilburn, and J. F. Wilburn together with all of the increase of, [fol. 56] from and to, the above described property, prior to the full payment of the indebtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full, save and except such livestock as may be herein especially reserved.

To have and to hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part thereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by our certain promissory note, as follows: One note date October 21, 1948, due January 4, 1949 for \$10,000.00 and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same shall stand secured by and payable under this [fol. 57] mortgage with the other indebtedness herein mentioned, provided, however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described property to secure the note, or notes, above named and

described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the property above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgagor the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same [fol. 58] now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself, at his own expense, to provide with food, pasturage and attention, and to give the same all the attention which the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of \$ at the execution and delivery hereof.

It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without

the consent of the bank should surrender possession of any of said property or sell any part thereof, or if the mortgagor should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enforce collection thereof in the same manner as if the full time for the [fol. 59] maturity of the same had lapsed. In the event that more than one note is secured by this mortgage, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisement. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the securing, taking and caring for any property above described or the gathering and marketing of any crops shall be borne by said mortgagor and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be canceled and released at the expense of the mortgagor. The taking of this mortgage shall not waive or impair any other security said bank may [fol. 60] have or hereafter acquire for the payment of the above indebtedness nor shall the taking of any such additional security waive or impair this mortgage, but said bank may resort to any security it may have in the order it may see proper.

A bill of sale hereunder from the said bank or any of its agents, officers, attorneys, or assigns, as such, conveying

the said property or any part thereof, shall be full and conclusive evidence and proof that all of the terms, conditions and prerequisites required herein have been fully complied with; and said mortgagor hereby ratifies and confirms any and all acts of the said bank, its officers, agents, attorneys and assigns, done under and by virtue hereof.

It is further agreed and stipulated between the parties hereto that in the event the bank should exercise its option to declare all of the indebtedness above referred to, immediately due and payable and proceed at once to enforce collection thereof, in the same manner as if the full time for the maturity of the same had elapsed, by reason of any of the foregoing actions on the part of the mortgagor, that then, and in that event, by the term "indebtedness" is meant the full amount of the principal and interest due by the mortgagor at the time that the bank exercises such option. In no event shall the bank collect or attempt to collect any unearned interest on said indebtedness at the time that the bank so exercises such option to declare said indebtedness due, but all interest included in the face amount of the note applicable to a period after the accelerated maturity shall constitute a credit against the face amount of the [fol. 61] note, and all interest paid in advance and applicable to a period after the accelerated maturity shall constitute a credit on the amount of indebtedness, as above defined, then lawfully owing on such note.

Erasures and interlineations made and approved before signing.

Witness my hand this the 21st day of October, A. D. 1948.

Wilburn Brothers Boat Company, a corporation, by
(S.) L. G. Wilburn, Pres., J. F. Wilburn, Sec.

Executed and delivered in the presence of the undersigned:

— — —, Signature unascertainable.

A. J. Martin.

Note: None of reverse side is filled in, therefore omitted by Reporter.

STIPULATION EXHIBIT 5

Denison, Texas, October 25, 1948.

One Year after date, without grace, for value received I, we, or either of us promise to pay to the order of J. F. Wilburn [fol. 62] and J. H. Wilburn at The Citizens National Bank of Denison, Denison, Texas, \$8,000.00, Eight Thousand and No/100 Dollars at the office of The Citizens National Bank of Denison, Texas, with interest from date at the rate of five per cent per annum. The makers, sureties, guarantors and indorsers of this note, and all other parties hereto, severally waive demand, presentment, notice of dishonor, diligence in collecting, grace, notice and protest, and agree to all extensions and partial payments, before or after maturity, without prejudice to the holder, neither will the renewal hereof extinguish any of the liabilities of the parties, and if this note is not paid at maturity and it is placed in the hands of an attorney for collection, or if it is collected through a Bankrupt Court, a Probate Court, or any other Court, then an additional ten per cent on the principal and interest shall be added as attorney's fees for collection.

Address: Denison, Texas.

Wilburn Brothers Boat Company, a Corporation, by
(S.) L. G. Wilburn, Pres., (S.) J. F. Wilburn, Sec.

Due

No.

CM "Wanderer".

[fol. 63]

STIPULATION EXHIBIT 6

THE STATE OF TEXAS,

County of Grayson:

Know All Men by These Presents:

That Wilburn Brothers Boat Company, a corporation, of Grayson County, Texas, hereinafter called the mortgagor, in consideration of the sum of one dollar to me in hand paid by J. F. Wilburn and J. H. Wilburn, a corporation hereinafter called bank, and for other valuable considerations, receipt of which is hereby acknowledged, have bar-

gained, sold and conveyed, and by these presents bargain, sell and convey unto said bank, its successors and assigns, the following described personal property, now located and situated in the County of Grayson, State of Texas, to-wit: (If mortgage covers growing crops, state the kind and the approximate number of acres of each. Fully describe all livestock, give number, kind, age and brand).

One 90 foot River Steering Wheel Excursion Boat "Wanderer".

The above described property is subject to a first lien to The Citizens National Bank of Denison, Denison, Texas and this mortgage is given as a second lien, together with all of the increase of, from and to, the above described property, prior to the full payment of the indebtedness hereinafter referred to. Also all other cattle, sheep, hogs, horses and other livestock situated in said County aforesaid now owned, or that may be hereafter acquired, by said mortgagor, until this mortgage is released in full save and except [fol. 64] such livestock as may be herein especially reserved.

To Have And To Hold all and singular the above described property unto said bank, its successors and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend the title to said property, and every part thereof, unto said bank, its successors and assigns, against every person whomsoever, lawfully claiming or to claim the same, or any part thereof.

This conveyance, however, is intended as a mortgage to secure said bank, its successors, and assigns, in the payment of certain indebtedness due and owing by me evidenced by our certain promissory note, as follows: One note dated October 25, 1948 due One year from date for \$8,000.00 One note dated ——— due ——— for \$—— and as well to secure the payment of all other indebtedness now owing said bank, and any and all indebtedness hereafter to become owing said bank, its successors, assigns or legal representative, whether evidenced by note, overdraft, or otherwise, which said indebtedness now or hereafter owing it is agreed shall be payable to the order of said bank at its office in Denison, Texas, and bear interest at the rate of ten per cent per annum from date of accrual until paid, and the same

shall stand secured by and payable under this mortgage with the other indebtedness herein mentioned, provided however, that it is hereby expressly stipulated, and provided that a first and prior lien is hereby expressly fixed on the property above described to secure the note, or notes, above specifically named, and the payment of all other indebtedness [fol. 65] by the maker hereof subsequently accruing, or not definitely and particularly named herein, shall be postponed and subordinated to the payment of the note, or notes, above named, and a first and superior lien is hereby declared and fixed on the above described property to secure the note, or notes, above named and described; and provided further that the payment of any other indebtedness of the maker hereof, not definitely and particularly named herein, out of the proceeds of the property above described, shall be made in the order in which said indebtedness may have been contracted.

This mortgage is given and received for and upon the representations, agreements, stipulations and conditions, made for the purpose of inducing said bank to part with certain moneys herein mentioned and accept the security herein given it, as follows, to-wit: (1) That mortgagor is the full owner of said property and has perfect right to give this first mortgage upon the same, unless a qualified ownership is herein expressly named; (2) That so long as the possession of said property is permitted to remain with mortgager the same shall not be sold, mortgaged or removed from the place above named without the written consent of the bank and that mortgagor will use the utmost diligence and care to preserve said property from waste or destruction, and have the same forthcoming for delivery to the bank, or purchaser in as good condition as the same now is, unavoidable loss alone excepted; (3) Such of the property herein conveyed as is livestock, the mortgagor binds himself at his own expense, to provide with food, pasturage and attention, and to give the same all the attention which [fol. 66] the most prudent person would give his own property in making the same suitable for market under the most favorable circumstances; (4) That said property is of the reasonable aggregate cash value of \$—— at the execution and delivery hereof.

It is understood that the mortgage lien hereby created shall extend to any renewal of the indebtedness hereby secured and this lien shall continue and be in force until all the indebtedness above referred to and each and every extension and renewal thereof shall have been fully paid.

It is further agreed between the parties that if at any time the said mortgagor should move or attempt to move all or any part of the above described property outside of the County where the same is situated as above stated, or if at any time in the judgment of said bank the said property should be neglected, injured or abandoned or otherwise mistreated or handled so as to impair the said bank's security or render the bank insecure, or if the mortgagor without the consent of the bank should surrender possession of any of said property or sell any part thereof, or if the mortgagor, should violate any of the other conditions of this mortgage, then, and in any such case, the said bank, at its option, may declare all of the indebtedness above referred to immediately due and payable and proceed at once to enforce collection thereof in the same manner as if the full time for the maturity of the same had lapsed. In the event that more than one note is secured by this mortgage, and default is made in the payment of the first when due, then the remaining indebtedness may be declared immediately due at the option of said bank.

[fol. 67] It is expressly agreed and stipulated between the parties that in case default be made by said mortgagor in the payment of the indebtedness above described when the same becomes due or is declared due and payable according to the terms hereof, then the said bank shall have the right through its agents to take immediate possession of all of said property and to either sell the same at private sale without notice to said mortgagor, or sell the same at public sale in the manner prescribed by law; or the said bank may, if it elects, enforce its lien by suit in the Court of proper jurisdiction. The said mortgagor hereby specially waives all right of appraisement. An attorney's fee of ten per cent of the amount of the principal and interest of the indebtedness remaining unpaid shall be taxed and made a part of the costs of foreclosure.

It is also agreed that all expense in connection with the

securing, taking and caring for any property above described or the gathering and marketing of any crops shall be borne by said mortgagor and secured by this mortgage.

Upon payment in full of the indebtedness secured by this instrument the same shall be canceled and released at the expense of the mortgagor. The taking of this mortgage shall not waive or impair any other security said bank may have or hereafter acquire for the payment of the above indebtedness nor shall the taking of any such additional security waive or impair this mortgage, but said bank may resort to any security it may have in the order it may see proper.

[ol. 68] A bill of sale hereunder from the said bank or any of its agents, officers, attorneys, or assigns, as such, conveying the said property or any part thereof, shall be full and conclusive evidence and proof that all of the terms, conditions and prerequisites required herein have been fully complied with; and said mortgagor hereby ratifies and confirms any and all acts of the said bank, its officers, agents, attorneys and assigns, done under and by virtue hereof.

It is further agreed and stipulated between the parties hereto that in the event the bank should exercise its option to declare all of the indebtedness above referred to, immediately due and payable and proceed at once to enforce collection thereof, in the same manner as if the full time for the maturity of the same had elapsed, by reason of any of the foregoing actions on the part of the mortgagor, that then, and in that event, by the term "indebtedness" is meant the full amount of the principal and interest due by the mortgagor at the time that the bank exercises such option.

In no event shall the bank collect or attempt to collect any earned interest on said indebtedness at the time that the bank so exercises such option to declare said indebtedness due, but all interest included in the face amount of the note applicable to a period after the accelerated maturity shall constitute a credit against the face amount of the note, and the interest paid in advance and applicable to a period after the accelerated maturity shall constitute a credit on the amount of indebtedness, as above defined, then lawfully existing on such note.

[ol. 69] Erasures and interlineations made and approved before signing.

Witness our hands this the 25th day of October, A. D. 1948.

Willburn Brothers Boat Company, a Corporation.
(S.) by L. G. Wilburn, Pres. (S.) J. F. Wilburn,
Sec.

Executed and delivered in the presence of the under-
signed:

_____,
(Signature unascertainable).

T. F. Miller.

Note: None of reverse side is filled in, therefore omitted
by Reporter.

[fol. 70] STIPULATION EXHIBIT #7

Customs Form 1342.

Treasury Department.

3.32, 3.33, 3.34, C. R. 1943.

June, 1944.

The United States of America
Treasury Department
Bureau of Customs

Bill of Sale of Enrolled Vessel.

To All To Whom These Presents Shall Come, Greeting:

Know Ye, That * We, R. D. Marshall, of Rock Island, Illinois, an owner of an undivided one-half ($\frac{1}{2}$) interest, and John D. Shuler, of Des Moines, Iowa, an owner of an undivided one-half ($\frac{1}{2}$) interest of the gas stern-wheel boat or vessel called the Wanderer of the burden of sixty-four (64) tons, or thereabouts, for and in consideration of the sum of Nine thousand (\$9,000.00) dollars, lawful money of the United States of America, to us in hand paid, before the sealing and delivery of these presents, by ** J. F. Wilburn,

* Here insert the name and address of each vendor, and the part conveyed by him.

** Here insert the name and address of each vendee, and the part conveyed by him.

J. H. Wilburn and L. G. Wilburn (each of whom thereby acquires an undivided one-third interest in the said Wanderer) the receipt whereof we do hereby acknowledge and are therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said ** J. F. Wilburn, J. H. Wilburn and L. G. [fol. 71] Wilburn, (each of whom thereby acquires an undivided one-third interest in the said Wanderer) their executors, administrators, successors, and assigns, all of the said gas stern wheel boat Wanderer or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture and all other necessities thereunto appertaining and belonging; the latest Consolidated Certificate of Enrollment and License of which said boat or vessel is as follows viz:

A True Copy of the Latest Consolidated Certificate of Enrollment and License.

The United States of America
Treasury Department
Bureau of Customs

Permanent or temporary—Permanent.

Certificate No. 3.

Measured at Rock Island, Ill. 1931.

Rebuilt at — 19—.

Remeasured at — 19—.

Official No. 231171.

Combined radio call and signal letters.

Service: Misc.

[fol. 72] Number of Crew, excluding Master: 3.

Horsepower: 100 Gas engine.

Consolidated Certificate of Enrollment and License

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, R. D. Marshall of 1337-21st Avenue, Rock Island, Illinois having taken and subscribed the oath required by law, and having sworn that he, owning one-half (1/2) to-

** Here insert the name and address of each vendee, and the part conveyed by him.

gether with John D. Shuler of 28 Foster Drive, Des Moines, Iowa, owning one-half ($1/2$), are citizen of the United States and the sole owner of the vessel called the Wanderer, of Chicago, Illinois and that the said vessel was built in the year 1931, at Rock Island, Illinois, of wood as appears by P.E. No. 4 issued at this port September 5, 1941, now surrendered by copy, original lost and property changed, and said enrollment having certified that the said vessel is a Gas Stern wheel; that she has one deck, no masts, a plain stem, and a square stern; that her register length is 65.0 10 feet, her register breadth 17.0 10 feet, her register depth 2.65 10 feet, her height — 10 feet; that she measures as follows:

	Tons	100ths
Capacity under tonnage deck	16	26
Capacity between decks above tonnage deck ..	—	—
Capacity of enclosures on the upper deck, viz:		
Forecastle —; bridge —; poop —; break —;		
Houses-deck 48.68 side —, chart —, radio —,		
excess hatchways —; light and air —	48.	68
Gross Tonnage	6.4	94

[fol. 73] Deductions under section 4153, Revised Statutes, as amended (section 77, title 46, United States Code):

Crew space, —; Master's cabin —; Steering gear, —; Anchor gear, —; Boatswain's stores, —; Chart house, —; Donkey engine and boiler, —; Radiohouse, —; Storage of sails, —; Propelling power (actual space, —),	0.	00
Total Deductions	—	
Net Tonnage	64.	

The following-described spaces, and no others, have been omitted, viz: Forepeak —, aft peak —, other spaces (except double bottoms) for water-ballast —; open forecastle —, open bridge —, open poop —, open shelter deck —, cabins —, companions —, galley —, skylights —, wheelhouse —, water-closets —; anchor gear —; condenser —, donkey engine and boiler —, steering gear —, light and air spaces —, other machinery spaces —, — and the owner — having

agreed to the description and measurement above specified, the said vessel has been duly Enrolled at this Port :

License

And R. D. Marshall, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded :

License is here granted for the said vessel to be employed in carrying on the Coasting Trade for one year from the date hereof, and no longer.

[fol. 74] Given under my hand and seal, at the Port of Chicago, Illinois, District of Chicago, this third day of September, in the year one thousand nine hundred and forty-six.

(S.) B. A. Meiners, Assistant Collector of Customs.

To have and to hold the said vessel "Wanderer" and appurtenances thereunto belonging unto them the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns, to the sole and only proper use, benefit, and behoof of the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns forever: And we the said R. D. Marshall and John D. Shuler have promised, covenanted, and agreed, and by these presents do promise, covenant, and agree, for ourselves, our executors, administrators, successors, and assigns, to and with the said J. F. Wilburn, J. H. Wilburn and L. G. Wilburn, their executors, administrators, successors, and assigns to warrant and defend the said vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In Testimony Whereof, The said R. D. Marshall and John D. Shuler have hereunto set their hand and seal this 7th day of June, in the year of our Lord one thousand nine hundred and forty-eight.

(S.) R. D. Marshall, (Seal). John D. Shuler, (Seal.)

Signed, sealed, and delivered in the presence of: (S.) Ruth Pastel, (S.) Walter L. Hulstedt.

[fol. 75] State of Iowa,¹

County of Scott. ss.

Be It Known, That on this 7th day of June, 1949, personally appeared before me,² R. D. Marshall and John D. Shuler and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 7th day of June, A. D. 1948.

(S.) Erna Hoefer. (Seal.)

[fol. 76] Indorsed on back as follows: Office of Collector of Customs, District of Galveston No. 22, Port of Houston, Texas.

Received for record on the 19th day of November, A. D. 1948 at 2:50 o'clock P.M., and recorded in Book No. B-4 Instrument No. 89.

George L. C. Pratt, Acting Collector, By (S.) —
(Name unascertainable), Deputy Collector of Customs.

¹ This acknowledgment may be made to conform to requirements of State laws.

² If the vendor is a corporation, write: — "who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent (the acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal, that fact must be stated in place of the statement respecting the seal,) of the (name of corporation), the corporation which is described in an- executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

STIPULATION EXHIBIT 8

Customs Form 1342.

Treasury Department.

3.32, 3.33, 3.34 C.R. 1943.

Jan. 1947.

The United States of America
Treasury Department
Bureau of Customs

Bill of Sale of Enrolled Vessel.

To All To Whom These Presents Shall Come, Greeting:

Know Ye, that * We, J. H. Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest, J. F. [fol. 77] Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest, and L. G. Wilburn, of Denison, Texas, an owner of an undivided one-third (1/3) interest of the oil stern-wheel boat or vessel called the Wanderer of the burden of sixty-four (64) tons, or thereabouts, for and in consideration of the sum of Nine thousand (\$9,000.0) dollars, lawful money of the United States of America, to us in hand paid, before the sealing and delivery of these presents, by** Wilburn Boat Co., a corporation the receipt whereof we do hereby acknowledge and are therewith fully satisfied, contented, and paid, have bargained and sold, and by these presents do bargain and sell, unto the said ** Wilburn Boat Company, a corporation, whose office and principal place of business is Durant, Bryan County, Oklahoma, its successors, and assigns, all of our right, title and interest of the said oil stern wheel boat or vessel, together with all the masts, bowsprit, sails, boats, anchors, cables, tackle, furniture, and all other necessities thereunto appertaining and belonging; the latest Consolidated Certificate of Enrollment and License of which said boat or vessel is as follows, viz: A True Copy of the Latest Consolidated Certificate of Enrollment and License.

* Here insert the name and address of each vendor, and the part conveyed by him.

** Here insert the name and address of each vendee, and the part conveyed by him.

The United States of America
Treasury Department
Bureau of Customs

Permanent or temporary—Permanent.
Certificate No. 3.

[fol. 78] Measured at Rock Island Ill., 1931.

Rebuilt at — 19—.

Remeasured at — 19—.

Official No. 231171.

Combined Radio call and signal letters.

Service: Misc.

Number of Crew, Including Master: 3.

Horsepower: 100 Gas engine.

Consolidated Certificate of Enrollment and License

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States, R. D. Marshall of 1337 21st Avenue, Rock Island, Illinois having taken and subscribed the oath required by law, and having sworn that he, owning one-half (1/2), together with John D. Shuler of 28 Foster Drive, Des Moines, Iowa, owning one-half (1/2) are citizen of the United States and the sole owner of the vessel called the Wanderer, of Chicago, Ill. and that the said vessel was built in the year 1931, at Rock Island, Illinois, of wood as appears by P.E. No. 4 issued at this port September 5, 1941, now surrendered by copy, original lost and property changed and said enrollment having certified that the said vessel is a gas stern-wheel; that she has one deck, no masts, a plain stem, and a square stern; that her register length is 65.0 10 feet, her [fol. 79] register breadth 17.0 10 feet, her register depth 2.65 10 feet, her height — 10 feet; that she measures as follows:

	Tons 100ths	
Capacity under tonnage deck	16	26
Capacity between decks above tonnage deck	—	—
Capacity of enclosures on the upper deck, Viz:		
Forecastle —; bridge —; poop —; break —;		
houses-deck 48.68, side —, chart —, radio —;		
excesses hatchways —; light and air —	48	68
Gross Tonnage	64	94

Deduction under section 4153, Revised Statutes, as amended
(section 77, title 46, United States Code) ·

Crew space, —; Master's cabin, —; Steering
gear, —; Anchor gear, —; Boatswain's
stores, —; Chart House, —; Donkey engine
and boiler, —; Radiohouse, —; Storage of
Sails, —; Propelling power (actual space,
—) —;

Total Deductions	0	00
Net Tonnage	64	

==

The following-described spaces, and no others have been omitted, viz: Forepeak —; aftpeak —; other spaces (except double bottoms) for water-ballast —; open forecandle —, open bridge —, open poop —, open shelter deck —, cabins —, companions —, galley —, skylights —, wheelhouse 11.38, water-closets —; anchor gear —; condenser —; donkey engine and boiler, steering gear —, light and air spaces 8.68, other machinery spaces —, — and the owner having agreed to the description and measurement above specified, the [fol. 80] said vessel has been duly Enrolled at this Port:

License

And R. D. Marshall, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

License is hereby granted for the said vessel to be employed in carrying on the Coasting Trade for One Year from the date hereof, and no longer.

Given under my hand and seal, at the Port of Chicago, Illinois, District of Chicago, this third day of September, in the year one thousand nine hundred and forty-six.

(S.) B. A. Meiners, Assistant Collector of Customs.

To Have And To Hold the said Oil, Stern wheel boat called "The Wanderer" of the burden of 64 tons or thereabouts and appurtenances thereunto belonging unto it the said Wilburn Boat Company, a corporation, its successors, and assigns, to the sole and only proper use, benefit, and

behoof of its successors, and assigns forever; And we the said J. H. Wilburn, J. F. Wilburn and L. G. Wilburn have promised, covenanted, and agreed, and by these presents do promise, covenant, and agree, for their executors, administrators, successors, and assigns, to and with the said Wil- [fol. 81] burn Boat Company, a corporation, its successors, and assigns to warrant and defend the said oil stern wheel boat called "The Wanderer" vessel and all the other before-mentioned appurtenances against all and every person and persons whomsoever.

In Testimony Whereof, The said J. H. Wilburn, J. F. Wilburn and L. G. Wilburn ha ... hereunto set our hand and seal this 24th day of September, in the year of our Lord one thousand nine hundred and forty-eight.

(S.) J. H. Wilburn, (Seal); (S.) J. F. Wilburn,
(Seal); (S.) L. S. Wilburn, (Seal).

Signed, sealed, and delivered in the presence of Alexander Gullett, James P. Riley.
State of Texas,¹

County of Grayson, ss.

Be It Known, That on this 24th day of September, 1948 personally appeared before me,² J. H. Wilburn, J. F. Wil-

¹ This acknowledgement shall be made to conform to requirements of the law of the locality where made.

² If the vendor is a corporation, write: "who being duly sworn, deposed and said that he is the president, secretary, or other officer or agent (The acknowledgment of an instrument by a corporation must be made by some officer thereof authorized to execute it by the board of directors of the corporation. If the corporation has no seal that fact must be stated in place of the statement respecting the seal) of the (name of corporation), the corporation which is described in and executed the within instrument, and that he knows the seal of the said corporation and that it is affixed and was so affixed to the within instrument by order of the board of directors of the said corporation at whose order he signed his name and acknowledged the within instrument to be the free act and deed of the said corporation," or such other words as may be required by State laws.

[fol. 82] burn, and L. G. Wilburn and acknowledged the within instrument to be their free act and deed.

In Testimony Whereof, I have hereunto set my hand and seal this 24th day of September, A. D. 1948.

(Seal) (S.) Alexander Gullett, Notary Public, Grayson County, Texas.

Indorsed on back: Treasury Department, Bureau of Customs. Bill of Sale of Enrolled Vessel. J. H. Wilburn, et al., to Wilburn Boat Company, A Corporation, Office of Collector of Customs, District of Galveston No. 22, Port of Houston, Texas. Received for record on the 19th day of November, A. D. 1948 at 2:55 o'clock P. M. and recorded in Book No. B-4, Instrument No. 90. George L. C. Pratt, Acting Collector, By (Name unintelligible), Deputy Collector of Customs.

STATEMENT BY MR. KEITH

Mr. Keith:

Your Honor, we have stipulated some facts to the Court reporter. I think it would be proper—

[fol. 83] The Court:

What is the general outline of that stipulation?

Mr. Keith:

Well, one, Your Honor, covers the use of the boat. The general outline of that is that the boat was not used solely for private pleasure purposes, but was purchased to be used for hiring and chartering and was remodeled and redesigned for that purpose. It was in fact used for that purpose to the extent that passengers were available up to the time it sank as a result of being burned by fire on February 25, 1949; that during January of 1949 the boat received some storm damage and as a result of that was placed over at the Lake Texoma Boat and Dock Company for repairs and it remained at the Texoma Boat and Dock Company for repairs until a few days before February 25, 1949, at which time it was returned to its regular mooring place at Burns Run Resort.

Another one, stipulation we have made, concerns the question of mortgages. We have stipulated that, I believe, it was

June, 1948, that the three Wilburn Brothers borrowed \$10,000.00 from the Citizens National Bank at Denison; that later on August 4th they borrowed an additional \$10,000.00, and pledged this boat by a chattel mortgage of that date to the bank; that on October 4th, a note was signed by Wilburn Boat, Inc., for \$10,000.00 to the bank, being in renewal and extension of that note of August 4th; that on October 21st, a chattel mortgage was given by the Wilburn Bros. Boat Company, A Corporation, to the same bank, reciting that it was in renewal and extension of the prior chattel mortgage; that on October 25, 1948, a note was given by this [fol. 84] corporation—I have forgotten exactly how that one was signed. I believe it was also Wilburn Boat Company, a Corporation, to Mr. J. F. Wilburn and Mr. J. H. Wilburn for \$8,000.00, and a chattel mortgage. The boat at that time was pledged to them as security for this \$8,000.00 mortgage; that those indebtedness of \$20,000.00 to the bank and of \$8,000.00 to Messrs. J. F. and J. H. Wilburn were unpaid on February 25, 1949; that those chattel mortgages had not been released and were still in full force and effect at that time, and that the making of the notes and the giving of the mortgages was done without the consent of the defendant.

We have stipulated further that on May 12, 1949, the defendant tendered to Messrs. Henry, Franklin and Glenn Wilburn, DBA Wilburn Boat Company, all premiums on the boat Wanderer from the time it was acquired by them in about June—whatever the date was—1948, and that on May 19th, that tender was refused without objection to its form or sufficiency.

We have stipulated that the boat was purchased by bill of sale, I believe the correct date was June 7, 1948, by Messrs. J. H., J. F., and L. G. Wilburn for a cash consideration of \$9,000.00 by bill of sale of that date.

That the ownership of the boat remained unchanged from that time until September 24, 1948, at which time it was sold and transferred by them to Wilburn Boat Company, an Oklahoma corporation.

[fol. 85] We have stipulated that the Oklahoma corporation, Wilburn Boat Company, being one of the plaintiffs herein, has never had a permit to do business in the State of

Texas, and does not now have a permit to do business in the State of Texas.

We have stipulated that the three Wilburn Brothers, that I have named, owned all of the stock of the Wilburn Boat Company, the plaintiff, an Oklahoma Corporation.

I believe that covers it, Your Honor. I may have left something out.

The Court:

All right.

J. F. WILBURN, One of Plaintiffs herein, first having been duly sworn, testified as follows:

Direct Examination.

By Mr. Alexandner Gullett:

Q. What is your name?

A. Frank Wilburn.

Q. What are your initials?

A. J. F.

Mr. Keith:

Excuse me. Mr. Hayes would like to make an opening statement if Your Honor will permit it.

The Court:

All right.

[fol. 86] Mr. Hayes:

I will ask Plaintiffs' counsel if he desires to make an opening statement.

Mr. Alexander Gullett:

The pleadings speak for themselves so far as we are concerned.

The Court:

Now, who are you?

Mr. Keith:

Excuse me, Your Honor. He is Mr. Edward B. Hayes of Chicago.

The Court:

All right.

OPENING STATEMENT ON BEHALF OF RESPONDENTS

Mr. Hayes:

This suit is brought, Your Honor, on a policy of marine insurance on a vessel used on navigable waters of the United States. Namely, the Mississippi, the Red River and Lake Texoma. It is a maritime contract governed by the Admiralty or Maritime law, governed by laws of the Federal Sovereignty, and not affected by the law of the state. The Plaintiffs in the suit are three individuals, partners, doing business as Wilburn Boat Company, to whom the insurance policy issued to the former owner was transferred by the agent when they bought the vessel from the former owner in June of 1948. And also Plaintiff here is an Oklahoma corporation, to whom they transferred and sold the boat in the fall of 1948, which is the legal and equitable owner of the vessel. Plaintiffs plead for performance of all conditions of the policy. We deny that. The policy of insurance ex-[fol. 87] pressly provides that it is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the insurers, and that, we think, constitutes an absolute bar to this suit. In addition the plaintiff—the vessel was pledged, first by the partnership, then by this Oklahoma Corporation to a bank in Denison for an indebtedness that was originally Ten Thousand Dollars, later increased to Twenty Thousand Dollars. Then pledged again by the corporation to two of the individual stockholders, Frank and Henry Wilburn. Under the provisions I read and under the laws administered by the Federal Court, of the Federal Courts in admiralty or maritime law we think that absolutely bars recovery. Of

course, under familiar decisions of the Supreme Court and other Federal Courts they know as a matter of judicial knowledge what constitutes navigable waters of the United States. And of course, we ask this Federal Court to take judicial notice that the waters herein involved are such waters. We rely especially on the defenses I have stated.

The Court :

Well, that is straining a good deal for me to take judicial notice that the waters of Lake Texoma are navigable within the meaning of the Admiralty Laws, isn't it?

Mr. Hayes :

I believe the definition of navigable waters of the United States under the decision by the Supreme Court in the Daniel Ball case—

[fol. 88] The Court :

They have expressly decided that the waters of Red River are not navigable.

Mr. Hayes :

The waters of Red River at the present time since the construction of the dam—

The Court :

I mean in that vicinity, of course.

Mr. Hayes :

I understand, Your Honor,—are navigable waters of the United States, and the Supreme Court holding that an artificial, purely artificial water where they just dug some dry land and then becomes navigable by which communication may be had between the States is navigable water of the United States subject to the jurisdiction of the United States.

The Court :

I want to see some authorities, because I know the Supreme Court of the United States has held that the waters of Red River at that point are not navigable in fact. I think that was held in the Texas and Oklahoma boundary dispute.

But I want your authorities upon the proposition that the waters of Lake Texoma are navigable within the meaning of the Federal law.

Mr. Hayes :

Certainly, sir. The United States Coast Guard is out there in charge, under that provision of the Constitution on the grounds that they are navigable. The vessel is an enrolled vessel.

[fol. 89] The Court :

I understand all those vessels are subject to registration, that they are all registered. But I want your authorities upon that proposition that those are navigable waters within the meaning of that clause. But go ahead from there.

Mr. Hayes :

Thank you, sir. In addition to what I have stated the vessel was built as a pleasure yacht, and her former owners used her as such. The Wilburns and the Oklahoma Corporation to which they transferred it chartered her, however, and used her for commercial purposes. They meant to do so from the beginning, but when the insurance was transferred to them that was not disclosed, nor when the policy was delivered to them, nor when any of the indorsements became effective. No disclosure was made of the intended or actual commercial use. That would, under the Admiralty law governing marine policies, alone, void the policy for failure to disclose material facts. The policy also expressly provides, "It is warranted by the insured that the within named vessel shall be used solely for a private pleasure vessel during the period of this policy and shall not be hired or chartered until permission is granted hereon."

The policy also expressly provides that it shall be void for any fraudulent or false swearing before or after the loss. J. H. Wilburn, examined on deposition after the suit was filed, said he was the pilot of the boat, but that he didn't find any letters about chartering the vessel, although there were some; didn't know whether there was more than

whether there was more than three or four, five, ten
90] or one hundred.

Court:

Didn't get your number. What was the last part of that
said?

Hayes:

that the policy itself renders the coverage void for any
d or false swearing, either before or after—

Court:

What did you say your claim was about this false swear-
I didn't get your statement.

Hayes:

the statement that he didn't know whether there was
—referring to letters about chartering the vessel—less
three of those letters. I beg your pardon. Didn't
whether there were more than three. He didn't know
whether there were less than six, less than ten, fifteen, one
hundred, one thousand, two thousand, five thousand, one
hundred thousand. Similar testimony was given by him
in respect to other letters. Similar testimony was given by
him in respect to the number of times passengers were
on the boat, and the number of passengers on the
boat at various times; that he didn't know if it was less
than two hundred. He didn't know if a letter showed to him
refreshed his recollection; he didn't know when the first
time was he remembered talking to his brother about ren-
ding the boat commercial. That is, he didn't remember the
time. And he didn't know whether the signatures
91] appearing alongside of his on some documents
deposited by the National Park Service were signatures of
his brother, and so on throughout that deposition, which is
long to read. We think those were not disclosures,
particularly the statements made under oath were not
disclosures. We think that the failure to disclose was for the pur-
pose of preventing a full discovery of the facts by the
court, and they fall under the provisions of the policy.
What we have in short is a policy issued to individuals
in a lawsuit by an Oklahoma corporation, and an averment to

the conditions of the policy which is denied. The burden is upon the plaintiffs to prove that there was a compliance which he has alleged with the terms of the policy.

The Court:

Proceed, Mr. Gullett.

Q. What is your name?

A. J. F. Wilburn.

Q. You are Frank Wilburn; is that correct?

A. Yes, sir.

Q. Is Glen Wilburn your brother?

A. Yes, sir.

Q. J. H. Wilburn is your brother Henry; is that correct?

A. Yes, sir.

Q. Mr. Wilburn, I will ask you whether or not in the early part of 1948, you and your brothers began negotiating for a boat? Is that correct?

A. Yes.

Q. Was that boat known as the Wanderer?

A. Yes, sir.

[fol. 92] Mr. Keith:

Excuse me. We can't hear you over here.

Q. Where was the boat purchased?

A. Greenville, Mississippi.

Q. State whether or not it was later transferred to Lake Texoma?

A. Yes. We purchased the boat on or about, I believe it was June 4th; somewhere around there; and brought it up Red River to Lake Texoma.

The Court:

When was that, in '48?

A. That was in '48, yes sir.

Q. Do you recall the month you got it over into Lake Texoma, Mr. Wilburn?

A. I believe it was in August.

Q. 1948?

The Court:

Where was that boat in Mississippi at the time? Was it on the Mississippi River?

A. It was in a lake off the Mississippi River, that adjoined the town of Greenville, Mississippi.

The Court:

All right.

Q. Was the boat placed in Lake Texoma?

A. Yes sir.

Q. Were certain repairs made on the boat after it was placed in Lake Texoma?

A. Yes sir.

Q. Were you issued a policy by the Firemen's Fund Insurance Company, Mr. Wilburn?

[fol. 93] A. Yes sir.

Q. Is that the policy?

A. Yes sir.

Q. We introduce the policy in evidence as Plaintiffs' Exhibit No. 1.

(Policy so marked, and is shown hereinafter. See Index for page reference.)

The Court:

What is the date of that policy?

Mr. Gullett:

May 22, 1948, is the original expiration date, and it was extended for another year after that, Judge Bryant.

Mr. Keith:

May I see it? (Mr. Keith examines policy.)

Q. After you got the boat on the Lake, what—just give Judge Bryant in your own words the nature of the repairs you did to the boat.

A. Well, after we taken the boat out of the river, we moved it overland to the edge of the lake, and we worked the hull over on the boat, and part of the interior we tore out at that time before we actually placed it on the lake, and after we did that we put it on skids and slid it into the

water of Lake Texoma, and taken it to Texoma Boat and Dock Company, and over there we scraped the boat completely off all over, the old paint; repainted it, put new rails up all around the bottom and top deck. We installed a Diesel engine; taken out the old engine that we had in there. We installed all new light plant equipment which [fol. 94] was a Diesel also. We installed all marine wiring, switch boxes, connections, and everything in connection with marine installation. We installed all new Hot Point marine galley. We removed all of the state rooms and replaced and redone the boat on the inside completely all over; put in a hardwood floor, painted the interior of the boat. We built little tables on the inside of the boat.

Q. Mr. Wilburn, when were those repairs completed?

A. I believe it was in September, late September.

Q. Now,—

A. —of '48.

Q. Now, Mr. Wilburn, this policy that has been introduced as Plaintiff's Exhibit 1,—where was that policy delivered to you and by whom?

A. It was delivered to me at our business at 120 North Austin Avenue, Denison, Texas, by Mr. R. L. McKinney.

Q. Mr. Wilburn, I believe the original amount of this policy was \$10,000.00, was it not?

A. Yes sir.

Q. Was this amount later increased?

A. Yes sir.

Q. Your Honor, I invite your attention to the indorsement dated December 20, 1948, which reads as follows:

"In consideration of an additional premium of \$234.01 it is understood and agreed that the amount of insurance hereunder is increased to \$40,000.00. It is further understood and agreed that the said vessel, for so much as concerns the Assured by agreement between the assured and Assurer in this policy is, and shall be valued at \$40,000.00."

[fol. 95] Mr. Hays:

Will you read the whole of it, Mr. Gullett?

Mr. Gullett:

Sir?

Mr. Hayes:

Will you read the whole if it?

Mr. Gullett:

I have no objection to reading all of it. "It is further understood and agreed that the lay-up and cancellation clauses are amended as follows: To return \$.25% per cent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters. Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return \$7.52% per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return nil per cent, net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival. H. H. Cleaveland Agency, by E. M. Joens. Otherwise, the policy remains unchanged." *changed."*

Q. Now then, after the boat was complete, for what purpose was the boat used?

A. Carrying passengers for hire, commercial use.

Q. Do you know about how many trips that you made, Mr. Wilburn?

A. Approximately around three or four.

Q. Mr. Wilburn, did anything happen to the boat in January of 1949?

A. Yes sir.

[fol. 96] Mr. Keith:

If Your Honor please, we raise the objection all this is covered by stipulation.

Q. I was just leading up to something. I may be killing a little time, Your Honor, but I think I can connect it up.

The Court:

All right. Was that when the fire occurred?

Q. The fire occurred February 25, 1949. That is undisputed, Judge Bryant.

The Court:

All right. You were asking about January of '49.

Q. The vessel was not used for commercial purposes, was it, from January up until the time it burned? Is that correct?

A. Yes sir.

Mr. Hayes:

We object to that as leading and suggestive.

The Court:

It is a little bit leading, but in this Court if we can lead enough to get along—

Mr. Hayes:

Further objection that it calls for the witness' conclusion and opinion.

[97] The Court:

I will overrule that and allow you an exception. Was the boat in use from January to February of 1949?

A. No sir.

The Court:

Go ahead with your examination.

Q. Where was the boat at the time it burned, Mr. Wilburn?

A. It was off the beach of Burns Run, Oklahoma, tied to a buoy.

Q. About what time of day or night did the fire occur?

A. Around one o'clock.

Q. In the morning or afternoon?

A. It was in the morning.

Q. Was any of the boat saved after the fire?

A. No sir.

Q. Just describe what happened to the boat?

A. Well, the boat—when I got out there the boat was on fire and it burnt up and sank and there wasn't any contents of the boat left whatsoever.

Q. Mr. Wilburn, did you make a claim to the Firemen's Fund Insurance Company for payment under this policy?

A. Yes sir.

Q. I hand you herewith a letter, and ask you if you received that letter?

A. Yes sir.

Q. That letter is signed Firemen's Fund Insurance Company by a man whose name I can't make out. Did you receive it in the United States Mail?

A. Yes sir.

[fol. 98] (Mr. Keith examines letter.)

Q. I introduce this as plaintiff's Exhibit 2.

(See Index for page reference where said exhibit is shown herein.)

Q. Your Honor, I will just state the substance of the contents.

The Court:

Just very briefly the substance.

Q. The substance of it is denial of liability under the policy.

The Court:

All right.

Q. Prior to the time the boat burned, had or had not a survey been made of that boat?

A. Yes sir.

Q. Who made that?

A. Mr. R. L. McKinney.

Mr. Keith:

Who did he say?

The Court:

R. L. McKinney.

Q. R. L. McKinney. Now, after the boat burned and you received this letter, has any—has the Firemen's Fund Insurance Company paid you anything on that policy? [fol. 99] A. No sir.

Q. Mr. Wilburn, did you sign that survey that was made of that boat?

A. Yes sir.

Q. Is that your signature here?

A. Yes sir.

The Court:

What is the date of that?

Q. The date of this is May 30th—No, December 20, 1948, Your Honor. You recall that instrument being prepared, Mr. Wilburn?

A. Yes sir.

Q. And you signed it?

A. Yes sir.

Q. Was that in turn delivered by you to Mr. McKinney?

A. I believe that is right, yes sir.

Mr. Gullett:

I introduce in evidence the Exhibit.

The Court:

Now, was that made in connection with the taking out of additional insurance?

A. (The witness) Yes sir.

The Court:

All right, and prior to the time the insurance was increased; is that correct?

A. (The witness) Yes sir.

Mr. Hayes:

But it wasn't, Your Honor.

[fol. 100] Mr. Gullett:

It was subsequent to the time the insurance was increased, Your Honor.

The Court:

All right. Well, but it was in connection with the additional insurance?

Mr. Gullett:

That is true.

The Court:

All right.

Mr. Keith:

We object to it, Your Honor, it is immaterial to any issue in this case and on the further ground that it is self serving, and—

The Court:

Let me see that.

Mr. Gullett:

The instrument tendered, Judge Bryant is an exhibit identified and attached to the deposition of Mr. Rossow of the H. H. Cleaveland Agency, and the letters in connection with it disclose that a copy of that was forwarded to the Firemen's Fund Insurance Company, which will be introduced in due course.

Mr. Hayes:

That statement, Your Honor—Pardon me, counsel, if Your Honor please, that statement is not quite correct.

[fol. 101] Mr. Gullett:

I refer to the—

Mr. Hayes:

The instrument as offered there is a photostat of a document. That is Point No. 1. The point with respect to the materiality of the document that we are raising now to its relevancy is that it is neither relevant nor material to any of the issues which are made in this case. We have an averment of performance and a denial of it. Those are the issues made by the pleadings and that document is not within the scope of the pleadings or the issues as they have been made.

Mr. Gullett:

Your Honor, a check of that deposition will disclose that we called on these gentlemen, taken at the defendant's request, for the original and instead of sending down the original they sent down a photostat.

Mr. Hayes:

That statement is not correct either, Your Honor. We have not been called on to produce an original. I presume what counsel refers to is cross examination of the witness Rossow. The witness Rossow did not have the original. He produced what was in his file. As far as the original is concerned, the original of the document Your Honor has in his hands is in Court. Accordingly the objection which we are making is to its materiality and relevancy, and I think that perhaps I should add the objection that the original should be offered rather than any copy, and I do that.

{fol. 102] The Court:

Well, have you examined this copy?

Mr. Hayes:

I have, yes.

The Court:

Is there any difference between it and the original?

Mr. Hayes:

No.

The Court:

I will overrule your objection and allow you an exception to that ruling. All right, go ahead.

(Survey marked Plaintiff's Exhibit 3. See Index for page reference.)

Mr. Gullett:

Q. Who wrote this up, who did the typing in here, Mr. Wilburn?

Mr. Hayes:

Your Honor, to save time may we have a running objection to all this line of testimony?

A. I believe Mr. McKinney did that.

The Court:

You make any objection you are advised to when the evidence is offered.

[103] Mr. Hayes:

My objection is to the materiality of the line of questioning which counsel is pursuing with reference to Plaintiff's Exhibit No. 2 (3?) and to all questions he may ask with reference to it, being immaterial and outside the scope of the pleadings.

The Court:

That is overruled and he is allowed an exception to that ruling. Now, go ahead, Mr. Gullett. Have you all made any stipulation about whether or not Mr. McKinney was the agent of this company?

Mr. Gullett:

No sir, we have not, Your Honor.

The Court:

Go ahead.

Mr. Gullett:

I invite your attention to this exhibit which will be No. 3. I invite your attention to this part.

"What waters are to be navigated: Lake Texoma, North of Denison, Texas.

"For what purpose is vessel to be used: Commercial.

"Is boat ever let, chartered, or used for carrying passengers for hire?"—It says the word "chartered", is that correct, Mr. Wilburn?

A. Yes sir.

Q. And that was made out and sent in before the fire occurred on the 25th of February, 1949; isn't that correct?

A. Yes sir.

[fol. 104] Mr. Keith:

If Your Honor please, we object to the question as being leading and suggestive and a leading and suggestive character of examination.

The Court:

Well, he says that was made in December, '48, so it was obvious that it was before the fire. Anything further?

Mr. Hayes:

We respectfully object, with your permission, Your Honor, if I may state, there is nothing except in the statement that the letter was sent in. That statement I submit would not be material.

Mr. Gullett:

I will connect it up, Judge, in just a minute.

The Court:

Well, of course, if it is not shown that that ever reached your company, why, that would be a different thing, but he says he will connect it up with later testimony, and subject to that statement I will overrule your objection, but if it is not connected up, I will probably sustain your objection.

Mr. Price:

Your Honor, we have it here in this deposition of their witness in Chicago. It comes out of their file. That is how it got in the Court room. We will offer that later.

The Court:

Just leave off the argument. Go ahead with the development of the testimony. Anything further?

[fol. 105] Mr. Gullett:

That is all, Your Honor.

The Court:

Any cross examination?

Mr. Keith:

Yes, Your Honor.

The Court:

Go ahead.

Cross-examination.

By Mr. Keith:

Q. Mr. Wilburn, when you started to purchase this boat over in Greenville you talked with Mr. R. L. McKinney in Denison about getting insurance on it, did you not?

A. I believe that it was just a little after I purchased the boat, and I had maybe talked to him before I purchased it actually, but I talked to him also after we had purchased it, and—

Q. And you had Mr. McKinney take over the job for you and your brothers as being in charge of obtaining your insurance, did you not?

A. Yes sir.

Q. And Mr. McKinney was, as a matter of fact, the agent of you and your brothers for the purpose of obtaining the insurance?

Mr. Price:

We object to any such questions being asked, calling for a conclusion. It is a matter of law for the Court to decide from the facts, what was done.

[fol. 106] The Court:

Well, I think that question is permissible. I will overrule your objection and allow you an exception. Did you ask him to get the insurance for you?

A. Yes sir.

The Court:

All right, go ahead.

Q. Now, when this boat was damaged in January of this year, it was taken over to Lake Texoma Boat and Dock Company; that is correct, is it not?

A. Yes sir.

Q. And remained there undergoing repairs until the latter part of February of 1948. I beg your pardon, January of 1949. Remained there until the latter part of February 1949, before it was brought back over to its regular home mooring place at Burns Run Resort.

A. I believe that is correct.

Q. Burns Run Resort is on the Oklahoma side, is it not?

A. Yes sir.

Q. Now, you spoke of the various work that you did in connection with this boat, Mr. Wilburn. In arriving at what you considered to be the valuation of that boat it is true, is it not, that you included in that amount a total of \$25,140.00 as being the amount which you claim is due by the—

Mr. Price:

Just a minute here.

Mr. Keith:

May I finish my question?

[fol. 107] The Court:

Let him finish his question.

Q. Which you claim is due from Wilburn Boat Company to the officers of the corporation?

Mr. Price:

We object to going into the details of the expenses on the boat, because the parties entered into a written agreement and fixed the value of this boat for the purpose of this insurance policy as \$40,000.00.

Mr. Hayes:

Your Honor, in response to that, there was a representation for \$40,000.00. Representation I should say in connection with request for insurance that \$40,000.00 was invested in it.

The Court:

Well, regardless of what the amount of the contract called for, if they can't show that amount of loss they are not entitled to it. I will overrule your objection and allow him to question him about that, Mr. Price, upon the question of value. Go ahead.

Mr. Keith.

Q. Will you answer the question, please, Mr. Wilburn, if you remember it?

A. Yes sir.

Q. That is true, that question I asked you?

A. Yes sir.

Q. Now, included in that you have an item of \$2100.00, do you not, Mr. Wilburn, covering the period from March 16, 1948 to May 30, 1948, labor of one man for 75 days at 14 [fol. 108] hours per day at \$2.00 per hour; is that correct?

A. Yes sir.

Q. Who was that man?

A. You mind if I see that?

Q. Not at all, sir.

A. I don't recall the exact man that I had this labor bill made out to.

Q. Maybe we can get along a little faster. That was either you or one of your two brothers that you were talking about there.

A. Yes sir, that is right.

Q. During the period from June 1, 1948, to July 19, 1948, you have an item here of \$8,280.00 for labor of three men at 60 hours per day, 2,640 hours at \$3.00 per hour.

A. Yes sir.

Q. With notation, "This labor being time consumed in moving boat from Mississippi to Lake Texoma." Is that correct, sir?

A. Yes sir.

Q. Now, July 19, 1948, is about the time you got the boat up here to Lake Texoma from its original mooring place in Greenville, Mississippi; is that right?

A. I don't believe we got it up here that quick. No sir, it was a later day.

Q. Later than that?

A. Yes sir.

Q. Now, the next item you have charged up here is an item of \$12,960.00 for the period from July 19, 1948, to November 19, 1948, labor of three men, 12 hours per day at \$3.00 per hour, 120 days, at 36 hours per day, 4,320 hours at \$3.00 an hour. This time being consumed in the repairs and remodeling boat.

[fol. 109] A. Yes.

Q. Now, in both of those last two items, the three men to whom you refer are you and your two brothers, Henry and Glen.

A. Yes.

Q. Then you have charged on here an item of \$1,000.00, estimated automobile mileage at 5 cents per mile 20,000 miles.

A. Yes sir.

Q. And the further item of \$800.00, estimated cost of air plane expense.

A. Yes sir.

Q. Making a total of \$25,140.00.

A. Yes sir.

Q. Now, neither you nor your brothers Henry or Glen had had any particular training or experience in the building or remodeling of boats, had you, Mr. Wilburn?

A. Well, no, not in particular.

Q. You had employed out there on that job people who were carpenters and who had training as carpenters and things of that sort, did you not?

A. Yes sir.

Q. There was a man named Blackshear you had employed out there throughout the entire time, was there not?

A. I believe that is right, yes sir.

Q. And he worked on the boat steadily and regularly every week.

A. Yes sir, I think that is right.

Q. And the compensation you paid Mr. Blackshear was \$45.00 a week, or thereabouts, was it not?

A. Yes sir.

Q. You had your younger brother, Alton Wilburn, working out there on the boat with you at the same time, did you not?

[fol. 110] A. Yes sir.

Q. And Alton worked steadily and regularly on the remodeling of the boat, did he not?

A. Yes sir, pretty regularly.

Q. And you paid Alton as well as I recall—I may be mistaken about this—but as well as I recall you paid Alton about \$20.00 a week for his services out there; is that correct?

A. Yes sir.

Q. During the time that this boat was being remodeled you and your brother Henry were still engaged in the operation of your grocery store over in Denison, were you not?

A. Yes sir.

Q. The grocery store continued to be operated by you during the entire time that this boat was being remodeled; is that correct, sir?

A. Not exactly by us, no sir. We had managers in charge of it while we were away.

Q. During the entire time the boat was being remodeled you did not employ any additional help of any sort in your grocery store, did you?

A. Not that I recall.

Q. And you and Henry, as you could, would devote your time to the operation of the grocery store, of course, wouldn't you?

A. Well, what little time that we did, yes sir. We did put in a little time on the grocery store, but not a great deal.

Q. The grocery store was at that time and continued to be until recently your means of a livelihood, did it not?

A. Yes sir.

Q. You have had prepared, have you not, Mr. Wilburn, a recapitulation of all checks drawn by Wilburn Boat Company on its account, have you not?

{fol. 111} A. Yes sir.

Q. Making a total of \$19,042.27; is that correct?

A. Yes, that is right.

Q. On this statement you have included in here all checks of Wilburn Boat Company, which were drawn on its account, being all payments made by Wilburn Boat Company, whether they were for labor or whether they were for ordinary repairs and maintenance or running repairs or whether they were for what we call capital improvement, have you not, sir?

A. I believe that is right.

Q. In other words, you have made no effort in here on this first column to separate the thing out. Now, you show on here in your second column, do you not, that out of this \$19,000.00 that \$5266.15 was paid out by you for labor to contractors and so forth.

A. Yes sir.

Q. And that a total of \$8,693.20 was paid out for equipment.

A. Yes sir.

Q. And that \$554.00 was paid out for plans?

A. Yes sir.

Q. And that supplies, you have \$283.68 worth of those; is that right?

A. Yes sir.

Q. And dock equipment, you have \$479.38 of that?

A. Yes sir.

Q. That was a dock you had built over at Burns Run Resort for this boat?

A. Yes sir.

Q. Then you have an item here of what you call Sundry of \$3,765.86.

A. Yes sir.

Q. Consisting largely of telephone calls and gasoline and oil and advertising and organizational expense and matters of that sort; is that correct, sir?

[fol. 112] A. Yes sir.

Q. Now, excuse me, just a moment, Your Honor. One of these is a partial duplication of the other and I have forgotten which one it is. Now, in addition to that, beginning back in June of 1948, various amounts were paid out, were they not, sir, by your Wilburn Bros. Grocery Company?

A. Yes sir.

Q. A partnership.

A. Yes sir.

Q. And you have compiled a list of those, totaling \$2,453.45.

A. Yes sir.

Q. And about what time do you estimate that the boat got up here from Greenville up to the Lake Texoma Dam?

A. Well, we figured 42 days from June 5th would put it to—put it—

The Court :

You got here about July 14th; is that right?

A. Yes sir. Probably around that time.

Q. I understood you to testify a few minutes ago that on the date of July 19th that I mentioned to you that you thought it was after that that the boat got here. That is the reason I was going in to that.

A. Well, I am not for sure. I don't recall the exact dates on that.

Q. Sometime in the latter part of July, 1948; is that correct?

A. I believe that that would be about correct, yes sir.

Q. And up until that date, which I had understood was July 19th, up until that date that you got the boat up here, all the amounts of money that have been expended by Wil-[fol. 113] burn Bros. Boat—by Wilburn Bros. Grocery were for the purposes of getting the boat from Greenville up here, were they not?

A. Yes sir.

Q. And then you had a rather considerable expense, did you not, sir, of building a skid and taking the boat out of the waters of the Red River and putting it over into the waters of Lake Texoma, didn't you?

A. Yes sir.

Q. And all of those amounts are included in here, are they not, sir, on this statement of expenses paid by Wilburn Bros. checks?

A. Yes sir.

Q. After the corporation was formed, did the grocery company continue, from time to time, to pay some of these expenses, loan the corporation money? You kept account of the money you loaned from the grocery company to the boat company?

A. Yes sir.

Q. And the total of those amounts was some \$5,204.52, was it not?

A. Yes sir.

The Court :

What is that item there?

Q. \$5,204.52. All of these amounts that I have just named, Mr. Wilburn, this 5,204.52, that was repaid by the corporation to the grocery, was it not, in two separate payments?

A. I believe that is right.

Q. And to that extent, that is included in the amounts of disbursements made by the corporation.

A. I think that is right.

[fol. 114] Q. This corporation that was formed by you and your brothers was the Wilburn Boat Company, was it not?

A. Yes sir.

Q. And you had that corporation incorporated in the State of Oklahoma.

A. Yes sir.

Q. For a capital, with a capital stock of \$40,000.00; is that right?

A. Yes sir.

Q. Mr. Wilburn, on these statements which were prepared by you and about which we were having some discussion this morning, there are one or two things I haven't made entirely clear. You have this one statement here that we have gone over of Wilburn Boat Company, recapitulation of checks drawn. That was \$19,042.27. I want to introduce this at this time as being a statement by them as to their expenses, without taking the time to detail each item in there.

(Said recapitulation or statement marked Defendant's Exhibit 1; see Index for page reference herein.)

Q. I was interrogating you this morning, Mr. Wilburn, with reference to this statement here, and I brought out that this total of \$5,204.52 at the end had been repaid.

The Court:

Yes, you have covered that.

Q. Yes sir.

The Court:

There is no use going over that again.

[fol. 115] Q. There is one other point I hadn't brought out, that the other total up above of \$2,453.45, that was also repaid by the corporation to the grocery store, was it not?

A. Yes sir.

Q. So all of that is included in the exhibit that we have introduced.

A. I believe that is right.

Q. My confusion was with reference to this statement, this further statement of Wilburn Boat Company, unpaid expenses totaling \$3,287.71. That is not included in the exhibit that I have introduced, is it?

A. No sir.

Q. So the amount of 19,000 plus there, plus this amount of 3,287.72 represents the expenditures of the partnership and of the corporation on this boat, does it not?

A. Yes sir.

Q. We introduce this as being a further statement of expenditures.

(Said statement marked Defendant's Exhibit 2. See Index for page reference herein.)

Q. Now, when you filed your income tax return, Mr. Wilburn, for the Wilburn Boat Company, Inc., you filed that for the period beginning July 12, 1948, and ending June 30, 1949, did you not?

A. Yes sir.

Q. And you filed it on an accrual basis, did you not, sir?

A. Yes sir.

Q. And in making your income tax return you did not capitalize on this return the expenditures for labor or material that we have been testifying about here at all, did you? [fol. 116] A. I don't think so, no sir.

Q. This corporation was created about July 10, 1948, was it not, sir?

A. Yes sir.

Q. You had it capitalized for \$40,000.00.

A. Yes sir.

Q. And the instrument I hand you, Mr. Wilburn, is a signed duplicate original of affidavit of payment of the amount of capital stock, which was signed by you and your brothers, was it not?

A. Yes sir.

Q. We offer this in evidence.

(Duplicate original of affidavit of payment of amount of capital stock marked Defendant's Exhibit 3. See Index for page reference herein.)

Q. Now, the only capital stock, the only asset of the Wilburn Boat Company was this boat; is that correct?

A. Yes sir.

Q. On July 10, 1948, at the time that affidavit was made the boat was on the River on its way up.

The Court:

Yes.

Q. —to the dam.

The Court:

Yes, that is true.

A. Yes sir.

[fol. 117] The Court:

That follows automatically. That was an Oklahoma corporation, was it not?

Q. Yes sir. That was an Oklahoma corporation.

A. Yes sir.

Q. The premiums that you paid in connection with this policy, Mr. Wilburn, you paid those to the H. H. Cleaveland Agency and not to Mr. McKinney, did you not, sir?

A. Yes sir.

Q. And those were payments on August 5, 1948, of \$419.56, and on February 8, 1949, of \$234.81.

A. Yes sir.

Q. Represented by these two checks I hand you here.

A. Yes sir.

Q. Defendant's Exhibits 4 and 5.

The Court:

Who is the Cleaveland Agency?

Q. I wanted to bring that out right now.

(Check for \$234.01, payable to H. H. Cleaveland Agency, dated 2/8/1949, marked Defendant's Exhibit 4. Check for \$419.56 payable to H. H. Cleaveland Agency, dated

8/5/1948, marked Defendant's Exhibit 4. See Index for page reference.)

Q. Do you know who the Cleaveland Agency is?

A. They are the company that we had the insurance with.

Q. The Cleaveland Agency is an agency in Rock Island, Illinois, which had the insurance on this boat for the former owners, Marshall and Shuler.

[fol. 118] A. I believe that is right.

Q. And which continued to keep the insurance after your acquisition of the boat.

A. Yes sir.

Q. Now, when you testified by deposition in this case previously you testified, did you not, Mr. Wilburn, speaking of Mr. McKinney, that you sort of elected him to be your insurance representative and to do whatever he wanted to do about getting insurance on it, and you answered, "That is right", didn't you?

A. That is right.

Q. And that is what the status of Mr. McKinney is in this matter.

A. Yes.

The Court:

He testified to that in answer to my question this morning. Go ahead. Now, don't repeat.

Q. You testified on direct examination this morning, Mr. Wilburn, if I remember your testimony correctly, that the repairs to this boat were completed in September; is that right?

A. I said on or about sometime in September. I don't recollect the exact date.

Q. Then how do you reconcile that, Mr. Wilburn, with this statement "Amount due Officers of the Corporation," that you prepared showing the expenditure of labor all the way down to November 19, 1948?

A. Well, there was the main contractors that had a bit lot of the work, probably got through with their work along about the time you spoke of there, and——

Q. Which time that I spoke of?

[fol. 119] A. I believe that was in November and our work continued on, on little odd jobs and things that had to be done that we didn't have the contractors working on.

Q. You had contractors, had Head and Head as contractors, didn't you?

A. Yes sir.

Q. To do most of the work?

A. Not most of it.

Q. The greater part.

A. They did a part of it, but they didn't finish their work and we settled off with them for a set fee and we did a little of the work ourselves and hired the rest of their work done.

Q. What other contractors did you have?

A. We had Koeppen and Baldwin, and we had Weersing I believe working some on the boat. That is Texoma Boat and Dock. And I don't know who else, but I think that would be—

Q. You had various contractors out there who were doing work on the boat, did you?

A. Yes sir.

Q. And the amounts you paid to them are shown in these exhibits that have been introduced here of your expenditures; is that correct, sir?

A. Yes sir.

Q. Now, at the time the boat sank was it moored to its dock, or was it moored a short distance off of the shore?

A. It was moored to the buoy that we used to tie it up to a ways off the shore.

Q. And that was what, about 300 feet off the shore?

A. Approximately 300 feet.

Q. Now, the place where you had the boat moored, that was in Oklahoma, wasn't it?

[fol. 120] A. Yes sir.

Q. The boundary line between Texas and Oklahoma was a considerable distance south of where the boat was moored at the time of the fire?

A. I think that is right, yes sir.

Q. And the regular dock of the boat was about 300 feet north of the place where the boat was moored at the time of the fire.

A. Yes sir.

Q. And all of that was over in Oklahoma?

A. Yes sir.

Q. During the operations of that boat you would carry passengers, would you not, back and forth from Oklahoma over to Texas and back, to the Texas side and back?

A. Well, we never docked on the Texas side to speak of.

Q. I know you didn't dock on the Texas side, but you would actually come over to the Texas side of the water?

A. Yes sir.

Q. Lake Texoma is such a lake that you can carry both goods and passengers from Oklahoma over to Texas and back over its waters, can't you?

A. Yes sir.

Q. In addition to your boat which was brought up the Red River and around the dam and placed on Lake Texoma, you know of other boats, do you not, that have been brought up Red River and taken—

The Court:

There is no use going into that, Mr. Keith, because the Supreme Court of the United States has declared unequivocally that the waters of Red River along that point are not navigable. Now, it may be different about your lake situation. You didn't navigate this boat up—

A. Sir?

The Court:

You didn't navigate this boat up the waters of the Red River? I know you brought it up the river, but you had to use land force to get it over the bars and things.

A. Yes, sir.

The Court:

You didn't navigate the river in its natural state, did you?

A. No sir.

The Court:

The Supreme Court has declared unequivocally in that Texas-Oklahoma case that the Red River is not navigable in

fact along that portion of it. It may be that it is exceptional as to the lake area.

Mr. Keith:

I had in mind, Your Honor, since the erection of this dam that an entirely different situation had been presented there because of the continuity of the water flow from the dam.

The Court:

All right, you can ask him about the navigation of that boat and you can offer that, but I don't think it has changed the physical situation at all, but it might, but go ahead, but I don't think so.

[fol. 122] Q. In bringing the Wanderer up the Red River, a part of that time at least the boat was operated under its own power, was it not?

A. Yes sir.

Q. And as you approached the dam, got within a few miles of the dam that forms Lake Texoma you operated the boat under its own power on up to that point, did you not?

A. Yes sir.

The Court:

Well, now, let me ask you, how far up the river did you navigate the boat under its own power?

A. Well, sir, there was times that we would get stuck on sand bars, and we had a winch truck along with us that winched us off of sand bars occasionally, but most of the way it come under its own power.

The Court:

All right, go ahead.

Q. And this boat was a 90 foot—

The Court:

What was the draft of this boat?

A. I believe it drew 36 inches loaded. Unloaded it would draw around about 28 inches.

The Court :

What was the width of it and the length of it ?

A. 17 foot width and 64 foot 11 inches length.

The Court :

And the draft of it was—

A. Was about 28 inches.

[fol. 123] The Court :

All right. But there were numerous times during that journey that you had to resort to land power in order to get the boat up the river. Is that correct ?

A. Yes sir.

The Court :

All right, go ahead.

Q. The boat had an official Coast Guard number when you bought it, did it not, sir ?

A. Yes, sir.

Q. And it continued to have an official Coast Guard number at all times, did it not ?

A. I believe that is correct, yes sir.

Q. The plans that you made for remodeling and redesigning the boat, you were required by the United States Coast Guard to submit those plans to the Coast Guard for approval, were you not ?

A. Yes sir.

Q. And you did submit those plans from time to time, I believe, as you went along there, didn't you ?

A. Yes sir.

Q. The Coast Guard inspected the boat before you started this work, did it not ?

A. Yes sir.

Q. And after that the Coast Guard inspected the boat at its regular stated intervals of about three months ; isn't that correct ?

A. Yes sir.

Q. The Coast Guard required you to have the boat operated by licensed pilots, did it not ?

A. Yes sir.

Q. And you had two licensed pilots for the operation of the boat, being yourself and your brother Alton; is that correct?

[fol. 124] A. Yes sir.

Q. Prior to the time of the purchase of this boat you had a conversation with Mr. G. A. Cooley of the Citizens National Bank, didn't you, in which you discussed with Mr. Cooley the possibility of your serving liquor on board this boat by reason of the fact that it was to be operated on Federal waters?

A. I don't recall definitely whether I did or whether I didn't.

Q. Now, at the time you purchased this boat you knew, of course, that it was being used for private pleasure purposes?

A. Yes sir.

Q. During the course of remodeling the boat, there were a good many things in there you took out because the Coast Guard required you to take them out, but which in fact were usable, such as the gasoline motors, electric light plant, and a great many things of that sort, did you not?

A. Yes sir.

Q. And in remodeling the boat there were—you took out partitions which were in there and which were usable; various partitions throughout the boat?

A. For scrap, yes.

Q. And those things all were in there at the time you bought the boat at its then value of \$9,000.00; is that correct?

A. Yes sir.

The Court:

Let me ask you something. Did you pass any other navigable craft between Texarkana and Denison, either going up stream or down stream, either way?

A. No sir: I don't believe that we did.

[fol. 125] The Court:

All right, go ahead.

Q. At the time, on October 25, 1948, when you and your brother J. H. Wilburn made this loan of \$3,000.00 to the corporation,—just before that, it is true, is it not, Mr. Wilburn, that you had asked the Citizens National Bank to loan the corporation additional money on the boat and the bank had refused to do that?

A. Well, I don't believe that they definitely refused, but we seen fit to go ahead and loan the boat money ourselves.

Q. Isn't it a fact that they had a committee from the bank to come out there and look over the boat and inspect the boat, and after they had made their inspection out there, they then told you they didn't care to loan any more money on the boat?

A. I believe that there was something to that effect. I don't know the exact words that was said, but I just don't recall conversation.

Q. That is exactly what they said any way.

Mr. Gullett:

We object to that as irrelevant and immaterial to any issue in the case. It is stipulated—

The Court:

It is stipulated about those loans and the amount of them. You have covered that. He says they didn't get any more money from the bank. Go ahead.

Q. Now, this policy of insurance, Mr. Wilburn, was in favor of Glen, Frank and Henry Wilburn, doing business as Wilburn Boat Company, was it not?

[fol. 126] A. Yes sir.

Q. And you understood from that indorsement that that was the partnership and not the corporation, did you not, sir?

A. At that time it was the partnership. We later incorporated it.

Q. The indorsement to which I direct your attention is dated August 6, 1948, is it not?

A. Yes sir.

Q. And your corporation was formed about July 10, 1948, was it not?

A. Yes, sir.

Q. So you understood, did you not, sir, by this indorsement of August 6, 1948, that the policy was in favor of the partnership and not of the corporation, and so testified at the time your deposition was taken, didn't you?

A. Well, I might have. I don't know. I might have misunderstood your question at the time of the deposition, but at this particular time I was busy and I never paid too much attention to how the indorsement read, but it should have read to the corporation.

Q. When your deposition was taken you were asked this question, were you not, "You understood from reading this indorsement D2A",—and that is the one to which I just referred, was it not?

A. Yes sir.

Q. "That that did not refer to the corporation but that referred to you and your brothers, Glen and Henry, doing business as a partnership under the name of Wilburn Boat Company."—You were asked that question, were you not?

A. Yes sir.

Q. And you answered it "yes sir", did you not?

A. Yes sir.

[fol. 127] Q. Now, on October 21, 1948, this chattel mortgage, which is attached to and forms a part of the stipulation, was executed by the corporation, was it not?

A. Yes sir.

Q. And the bank required you to execute, required the corporation to execute a new chattel mortgage in lieu of the old one executed by the partnership; is that correct?

A. Yes sir.

Q. Wilburn Bros. Boat Company, by whom this is signed, did you intend for that to be the same thing as the Wilburn Boat Company, the corporation, the Oklahoma corporation, which is the plaintiff in this suit?

A. I didn't quite get your question.

The Court:

Well, you have got it there, the name of your company seems to be the Wilburn Boat Company, but he asked you if that instrument signed as Wilburn Bros. Boat Company was intended to be the act of the corporation, the Wilburn Boat Company.

A. Well, yes. It was a corporation of the Wilburn Brothers.

Q. And that was a mistake on your part in stating the name of it as Wilburn Brothers Boat Company instead of the Wilburn Boat Company; is that right, sir?

A. Yes.

Q. And this note that was signed on October 4, 19—

The Court:

Let me ask you a question there. Were you and your two brothers the sole and only owners of the stock in this corporation?

A. Yes, sir.

[fol. 128] The Court:

All right.

Q. That is the only corporation you have had, is it not, Mr. Wilburn?

A. Yes sir.

Q. And when you signed this note of October 4, 1948, you signed it Wilburn Boat, Inc., did you not, sir?

A. Yes, sir.

Q. And that was still the one corporation that you have had that was doing these transactions?

A. Yes sir.

The Court:

You and your two brothers were the only partners in the partnership of the Wilburn Boat Company.

A. Yes, sir.

Q. Excuse me just a moment, Your Honor

The Court:

All right.

Q. I believe that is all.

The Court:

Anything further?

Re-Direct Examination.

By Mr. Alexander Gullett:

Q. Mr. Wilburn, to whom were these checks delivered? You didn't deliver them direct to the Cleaveland Agency, did you?

A. No sir.

[fol. 129] Q. To whom were they delivered?

A. R. L. McKinney Insurance Agency at Denison.

Q. Denison. Do you know what Mr. McKinney does over at Denison, Mr. Wilburn?

A. Yes sir.

Q. What is his business?

A. Insurance business.

Q. Has he written other policies for you for other companies?

A. Oh, yes.

Q. He handles your insurance generally, isn't that correct?

A. Yes sir. He handles 90% of it.

Q. That is all.

The Court:

Have you all made any attempt to settle your differences in this case or not?

Mr. Hayes:

I am sorry, I didn't hear you, Your Honor.

The Court:

I say have you all made any efforts to settle your differences in this controversy or not?

Mr. Gullett:

Yes, I made them a proposition this morning, Your Honor.

(Remainder of discussion along this line omitted.)

Mr. Gullett:

Your Honor, I want to ask Mr. Frank Wilburn one more question.

[fol. 130] The Court:

All right.

Re-Direct Examination of J. F. (Frank) Wilburn continued by Mr. Gullett, as follows:

Q. Now, Mr. Wilburn—

The Court:

I want to ask him one to clear up this record. Now, in order that the record may be clear on this point, after you reached the vicinity of the lake or dam on the lake, there are no locks or canal of any kind entering into the lake from Red River, is there?

A. No sir.

The Court:

And in order to get this boat, the Wanderer, from Red River into the lake you had to skid it on to dry land and skid it across the dry land and then put it into the lake from the dry land approach?

A. Yes sir.

The Court:

All right. All right, go ahead.

Q. Mr. Wilburn, in addition to the accounts shown in these various exhibits that have been introduced in evidence, evidencing the payment of some \$22,000.00, did you folks have any other record over there that you kept of monies owed by the boat company?

A. Yes sir, we did.

[fol. 131] Q. How was that kept, please, sir?

A. It was kept in a little book in the store and charged to the boat company.

Q. Has that account been paid by the boat company?

A. No sir.

Q. I hand you herewith what was marked for the purpose of the deposition D-25. Is this the book you are referring to?

A. Yes sir.

Q. How much does that disclose you owe on open account to the store account?

A. \$4,708.54, less—Well, I believe 15 underneath it hasn't been added to it.

The Court:

What are those expenditures for?

Mr. Keith:

If the Court please, I am going to object. Every bit of that stuff is included in these two exhibits already in here.

Mr. Gullett:

Let me straighten that out. That is what I thought originally.

Q. Mr. Wilburn, are any of the amounts shown in the book you have in your hand included in these amounts on the exhibits?

A. No, sir, I don't think so.

The Court:

What is the general nature of those items constituting that amount?

[fol. 132] A. Well, sir, it is labor and material that went into the boat that was paid from our grocery business and charged to the boat company. We kept this in our regular files in the case with the grocery store along with the other.

The Court:

Well, why are you uncertain about whether or not those items are included in these itemized statements that Mr. Keith has questioned you about?

A. Well, sir, the balance that he showed me a little while ago, there, it doesn't correspond with what we have in this boat. I got to checking into it and I found that this balance here on this book is not included in that.

The Court:

And none of these items in this book are included in those itemized statements he had there?

A. Not to my knowledge.

The Court :

Well, to your knowledge——

A. Sir?

The Court :

Well, to your knowledge are they not included in any of those items?

A. Yes sir.

Mr. Keith:

May I have a few moments on that, Your Honor?

The Court :

Yes.

[fol. 133] Mr. Keith:

I went into that pretty thoroughly. I want to be satisfied in my own mind. I believe to save time I will defer examination on this until I have checked into it. I know I went into that fairly thoroughly during the deposition.

The Court :

Let Jake mark that for identification.

Mr. Keith:

Surely. May I have permission to take it with me for the purpose of checking it tonight?

The Court :

Yes.

Mr. Keith:

And the other two exhibits to which it relates?

The Court :

That is all right.

Defendant's Exhibit 6 is marked on book for the purpose of identification only, same not being offered in evidence by the Defendant.)

The Court:

Let me ask you gentlemen one thing in order to clear up this admiralty phase of this matter. You don't make any contention that the upper reaches of the Washita or Red River either are navigable streams in fact, do you?

Mr. Hayes:

How is that?

[fol. 134] The Court:

I mean those that contribute to this lake area.

Mr. Hayes:

Your Honor is asking me that question?

The Court:

I am asking you, but I know the answer to it already. I am talking about the upper reaches of the Red River and the Washita, the two streams that empty into Lake Texoma; no claim is made that those streams beyond the lake area or where the water is raised in them by the lake level, you don't make any claim that either one of those streams is navigable?

Mr. Hayes:

Your Honor has the advantage of me in Your Honor's familiarity with the situation.

The Court:

I do. That claim would be ridiculous, because you can't navigate them in skiffs in their upper reaches, much less a boat.

Mr. Hayes:

I don't know the upper reaches. The only thing, something that I am sure Your Honor is familiar with, is that when water becomes navigable by building a dam, then that water becomes a part of the navigable waters of the United States.

The Court:

Well, that is where I think we differ, because this is just [fol. 135] an inland lake is all it is, and I don't think that it could possibly be construed as navigable waters of the United States, because I am certain that in the authority you cited me there was, if it had any relation to lakes, that it was probably some tributary or channel that either went into or out of the Great Lakes and was a navigable stream in fact, and a continuous body of navigable water, and that is what distinguishes navigable waters within the meaning of the law from these inland lakes. But I know your point, but I don't think that we are operating on admiralty law in this case, but that is no final judgment. I will hear you fully on it, but I want the record made abundantly clear on that, because the upper reaches of the Red River and the Washita are known as a matter of common knowledge in this section not to be navigable in fact. You agree to that, don't you, Mr. Keith?

Mr. Keith:

Your Honor, I have never been on them. I am not much of a fisherman. I have never been on the lake but twice.

The Court:

Well, I thought all the dry landers knew that, but we will have some proof on it if it is necessary. That clears up the admiralty record as far as I am concerned. You all go ahead to other matters.

Recross-examination.

By Mr. Keith:

Q. When you got this boat up to the dam you took it out on the Oklahoma side, didn't you, Mr. Wilburn?

A. Yes sir.

[fol. 136] Q. And about how far were you from the dam at the place where you took it out of the water?

A. About, approximately 600 feet.

Q. East of the dam?

A. Yes sir.

Q. And then you took it around over on the Oklahoma side and put it back into the water there.

A. No sir. We put it in the water on the Texas side.

Q. You skidded it across the dam.

A. Yes sir.

Q. Over to the Texas side and put it in to the lake on the Texas side.

A. Yes sir.

Q. Now, in coming down the Mississippi from Greenville, did you get stuck on sand bars in there?

A. Not on the Mississippi, no sir.

Q. Did you see other boats getting stuck on sand bars in the Mississippi?

The Court:

Well, there is no question about the navigability of the Mississippi, nor about the navigability of the Red up as far as Shreveport.

Q. All right, sir. I was trying to show the existence of sand bars in these other streams. In coming up Red River up as far as Shreveport you got stuck on sand bars up to that point?

A. Yes sir. I believe we had some little trouble there.

Q. And had to get winched off of those as well?

A. Yes sir.

Q. I believe that is all.

The Court:

Anything further?

[fol. 137]

COLLOQUY

Mr. Gullett:

That is all. Now, Your Honor, we offer in evidence the depositions of F. B. White and E. H. Rossow, taken in this case. It is a rather lengthy deposition, has lots of correspondence in it. Shall I just have the Court reporter mark it without reading the entire deposition?

The Court :

Well, you can have them marked as being offered in evidence, but if you can, just state to me what you claim to be the legal effect of that testimony.

Mr. Hayes :

Before they are marked and——

The Court :

Before they are offered.

Mr. Hayes :

May I have my objection before they are admitted?

The Court :

Yes sir.

Mr. Hayes :

As to each question separately since he is not taking them separately, as not within the issues as made by the pleadings.

The Court :

All right. I don't know how to rule on that objection until I see what the questions are. Who are these parties and what is their relation?

[fol. 138] Mr. Gullett :

These parties, Mr. F. B. White whose deposition is first, is connected with the Cleaveland Agency, taken at the request of the defendant. The other gentleman is a man by the name of Rossow, who is also connected with the Cleaveland Agency. And my main purpose in introducing the deposition is to show the survey that was made, which was delivered to the company prior to the time of the fire.

The Court :

Well, that was in December of '48.

Mr. Gullett :

Sir, it was made in December of '48, and Mr. Rossow's letter to the Firemen's Fund Insurance Company inclosing

this application and re-survey bears date of February 9, 1949, which was transmitted by the Cleaveland Agency to the Firemen's Fund Insurance Company on February 9th, and the fire did not occur until February 25th. The purpose in introducing that is to show that the company did have notice prior to the time of this fire that the boat was being used for commercial purposes and for charter, that they had knowledge of it.

The Court :

That is the survey that was offered in evidence this morning?

Mr. Gullett :

Yes sir.

The Court :

All right. I will overrule his objection and allow you an exception to that ruling.

[fol. 139] (Depositions of F. B. White and E. H. Rossow, bound in one volume, marked Plaintiff's Exhibit 4, and are omitted herefrom at request of counsel.)

Mr. Gullett :

Now, with reference to proof of loss, I introduce that part——

The Court :

Now, is there any controversy about that being timely filed or about the details of it in any way, except as to amount?

Mr. Gullett :

Yes sir, there is. They have denied in their answer that they ever received a proof of loss and there is one other thing, one other letter in this deposition, Exhibit 4, that was attached by the witness Rossow, which reads as follows :
"Denison, Texas, March 23, 1949.

R. L. McKinney Agency,
307 W. Woodward Street,
Denison, Texas.

H. H. Cleaveland Agency,
Western Marine Department,
A-839-175 W. Jackson Blvd.,
Chicago, Illinois.

Fireman Fund Insurance Co.,
San Francisco, California.

GENTLEMEN :

Enclosed herewith please find Sworn Statement in Proof of loss covering the yacht 'Wanderer'.

[fol. 140] Since we have not been furnished as requested a company form proof of loss you will please consider this formal proof of loss.

You are further advised that we are requesting that prompt adjustment be made of the claim as we have suffered loss approximately double the value of insurance carried on the boat.

Will you please let us have your prompt reply.

Yours very truly, (S.) L. G. Wilburn, President, Wilburn Boat Company, a Corporation, and as Partner of Wilburn Brothers, dba Wilburn Boat Company."

It has these notations placed on it. "Ted Note: I talked to Ed Hayes re. this. He wanted proof so I let him have it. Jake."

Mr. Hayes:

That we move to strike out.

The Court:

Well, unless there is some explanation of it, I will sustain the objection to that.

Mr. Gullett:

As to that last part I read?

The Court :

Yes.

[fol. 141]

Mr. Gullett :

All right.

The Court :

Unless it is identified as to the source or connection of the individual making those notations. If that is done, why, it would probably be admissible. But I will sustain your objection to it at this time.

Mr. Gullett :

I will introduce the first Cross Interrogatory propounded to the witness Edward D. Lawson.

“Cross-Interrogatory 1. There is attached hereto a copy of sworn statement and proof of loss in this case and marked ‘Exhibit A’ for purposes of identification. Will you please state whether or not you have heretofore had occasion to see a copy of this sworn statement and proof of loss and, if so, when and where.”

Mr. Hayes :

Just a moment. We object to that.

The Court :

Now, who is Lawson?

Mr. Gullett :

All right, sir. He is in the insurance business, Vice-president and Western Manager of Fireman's Fund Insurance Company.

The Court :

Is that the company involved here?

[fol. 142] Mr. Gullett :

Yes sir, that is the company involved here.

Mr. Hayes:

We object to the question which counsel is, as I understand now, about to read the answer to, and which he read earlier, namely the question about proof of loss. We don't think that that aids the plaintiff in any way or is material to the issues in the case. We also think that the manner of proof of loss is also self serving, which I will indicate if required.

The Court:

It is a question whether or not your company had notice of it. You are claiming they didn't, aren't you?

Mr. Hayes:

So far as the proof of loss is concerned, I think the issue made by the pleadings, as I recall them,—I don't want to be bound by this—was their insufficiency with respect to the office to which they were sent as required by the policy.

The Court:

Well, if your vice-president had notice of this claim of proof of loss, I think that will satisfy it and that is what I understood it to be. I will overrule your objection and allow you an exception to that ruling.

Mr. Gullett:

Answer: "Yes, I have in my office in Chicago. I am attaching a copy of an envelope. This document, which purports to be a proof of loss, was mailed to the Chicago office, although the document itself is addressed H. H. Cleaveland [fol. 143] Agency, which has no office in Chicago but only in Rock Island."—And there is the envelope and the sworn proof.

Mr. Hayes:

Did you read the whole answer?

Mr. Gullett:

Sir?

Mr. Hayes:

Did you read the whole answer?

Mr. Gullett:

Yes, all there was here.

Mr. Hayes:

Did it say something about attached to an envelope?

The Court:

Yes, he did.

Mr. Gullett:

Yes. Here is the envelope attached.

Mr. Hayes:

Then, that is not your statement. That is part of the answer.

Mr. Gullett:

That is exactly what I am talking about. "This document, which purports to be a proof of loss, was mailed to the Chicago office, although the document itself is addressed H. H. Cleaveland Agency, which has no office in Chicago but only in Rock Island.

[fol. 144] Mr. Hayes:

You are offering the envelope I assume.

Mr. Gullett:

Yes, that is part of it. Also I offer that attached purported proof of loss.

Mr. Hayes:

We object to it, of course, on the same grounds.

The Court:

All right, the same ruling.

J. H. WEERSING, Plaintiffs' witness, first having been duly sworn, testified as follows:

Direct examination.

By Mr. Alexander Gullett:

Q. What is your name?

A. J. H. Weersing.

Q. Mr. Weersing, what is your business?

A. I am president and manager of Lake Texoma Boat and Dock Company.

Q. What is the business of the Lake Texoma Boat and Dock Company?

A. Boat repair, storage and boat sales.

Q. Mr. Weersing, how long have you been in business at that location, please, sir, or how long has the Lake Texoma Boat and Dock Company been in business?

A. About four years and five months.

Q. During that period of time, have you had much or little experience in the selling of boats?

[fol. 145] A. Yes, and in that time I have sold 50 or 60 boats.

Q. Will you describe the kind of boats sold by you during that period of time?

A. They run from small inboards up to cruisers 30, 40, 42 feet long.

Q. Are you familiar with the fair cash market value of different types of boats on Lake Texoma?

A. I think so.

Q. Mr. Weersing, did you ever have occasion to be on or be around the boat Wanderer?

A. Yes sir, I have.

Q. Many or few times?

A. Many.

Q. Were you on it when the final repairs were made on it?

A. Yes sir, I was.

Q. I believe those last repairs after the storm were made at your dock company, weren't they?

A. That is correct.

Q. Mr. Weersing, do you have any opinion at this time as to what the fair cash market value of that boat was prior to the time of the fire?

Mr. Keith:

We object to the question, if the Court please, until there is shown there is a market at that place for a boat of such a nature.

Mr. Hayes:

We have the further objection, Your Honor, that it was alleged as a defense here that there was an affirmative statement that these parties had \$40,000.00 in this boat. The questions of fair cash market value are not relevant to the pleadings.

[fol. 146] The Court:

Well, I think that goes more to the weight of it than the admissibility of it. I will let him answer the question. Overrule you objection and allow you an exception to that ruling.

Q. What in your opinion, Mr. Weersing, was the fair cash market value of that boat on Lake Texoma at the time it burned?

Mr. Keith:

The same objection.

A. I would say 40 to 50 thousand dollars.

Q. That is all.

Cross-examination.

By Mr. Keith:

Q. Mr. Weersing, about what is the area of Lake Texoma, expressed however most convenient to you, in square miles or acres?

A. I am more familiar with the number of shore line miles than I am with the area.

Q. Will you give me, what is the number of shore line miles?

A. Approximately 1200 miles.

Q. Now, at its widest point, about what is the width of Lake Texoma?

A. I would say the single longest stretch, straight stretch, of water wouldn't run over ten miles.

Q. And about what is the length of Lake Texoma?

A. I can't answer that question.

Q. Well, what is your best estimate? You have been all over the lake any number of times, haven't you, Mr. Weersing?

[fol. 147] A. Well, what I am referring to, I just got through saying that the single longest straight stretch of water would be about ten miles.

Q. Well, now, explain that answer. It is a pretty big lake.

The Court:

That is measured in a north and south direction across the main or east area of the lake.

A. I would say from the Washita Point back to the Thompson property would be about ten miles.

Q. That would be north and south, from north to south?

A. Yes sir.

Q. East and west?

A. About six miles.

Q. From the dam you say—

A. I would say from the Oklahoma shore to Preston Peninsula.

The Court:

That is the main body of open water in the lake.

A. That is correct.

Q. About how far beyond that west does the lake itself go?

A. 40 miles.

Q. You have been all over the lake any number of times, of course. You just live out there and that is your business, being on the lake, isn't it?

A. That is right.

Q. What is the situation with reference to the depth of the lake, Mr. Weersing? Explain the depth of the lake to us.

A. It will vary from three feet to 125 feet.

[fol. 148] Q. Now, do you know about how many boats,

just approximately how many boats are regularly kept and used on Lake Texoma?

A. No, I don't.

Q. They run into thousands, don't they?

A. I understand the Engineers have approximately 3400 boats registered.

Q. Now, at your Lake Texoma Boat and Dock Company you have storage facilities for boats, do you not, sir?

A. That is correct.

Q. I don't know whether that is the right phrase for it or not. But about what is the size of the largest boat that you have at your place, sir?

A. 50 feet overall.

Q. And what is the draft of a boat of that sort?

A. That boat draws four feet and eight inches.

Q. Now, about how many other large boats do you have at your place other than that one?

A. 50 or 60.

Q. Now, in addition to your place, there are a good many other places around the lake which also are in this business of selling boats, repairing boats, and providing storage facilities for them, are there not?

A. Correct.

Q. And do those other places have boats of substantially the same size and substantially the same numbers as you have?

A. Yes, they do.

The Court:

So far as your knowledge goes, all these crafts are limited to what is known as pleasure craft, aren't they?

A. Yes sir, they are.

[fol. 149] The Court:

There is no kind of cargo carriers on this lake, are there?

A. There is one that might possibly be classed as such.

The Court:

Well, that is a private undertaking, isn't it, for accommodation of private parties? It doesn't make any practice of

hauling commodities or goods of any kind for hire to the public, does it?

A. They have hauled passengers for hire this past year.

The Court:

Well, but I am talking about goods and cargoes, freight. There is no cargo carrier on the lake, is there?

A. No sir.

The Court:

All right.

By Mr. Keith:

Q. Are you familiar with a boat out there by the name of the North Star?

A. I have never heard of it.

Q. That is not the passenger carrying boat to which you referred?

A. No.

Q. Are you familiar with a boat owned and operated out there by Mr. E. L. Zink?

A. Yes sir.

Q. For what commercial purposes has that boat been used? It has been used to carry cargo, hasn't it, of some sort?

[fol. 150] A. Not to my knowledge.

Q. What are the facts, Mr. Weersing, as to whether there was such a thing in February, 1949, as a market at Lake Texoma for an excursion boat of the type and build of the Wanderer?

A. That is an abstract question and a hard one to answer. About the only indication I can give on that is that I have had inquiries as to the possibility of operating——

Q. But you yourself——

A. —a boat on the lake.

Q. You yourself have had no information or experience——

The Court:

There is not any established market for the sale and purchase of these pleasure boats of this type out there any way, is there?

A. No sir, there is not.

Q. You have had no information or experience, have you, Mr. Weersing, with the purchase or sale of excursion boats such as the Wanderer, have you?

A. Not recently.

Q. Well, had you at any time, say, within a year or two prior to February, 1949?

A. No sir, not since before the war.

The Court:

This is the only boat of its type on the river, on the lake; only one that has ever been there, isn't it?

A. Yes sir.

Q. What is the name of the boat you say has been used for carrying passengers for hire?

A. The Pirate.

[fol. 151] Q. About what was the size of that boat?

A. She was 72 or 73 feet overall, formerly the Moulton, belonged to the U. S. Army Engineers.

The Court:

I believe that boat got on this lake by overland transportation, too, originally, didn't it?

A. Yes. It did.

Q. Where did that boat come from?

A. From the Mississippi River.

Q. And what was the draft of that boat?

A. I don't know exactly, but in the neighborhood of seven and a half or eight feet.

Q. And it was used—is it still up there?

A. Yes, it is.

Q. Is it still being used?

A. No sir.

Q. —to carry passengers for hire?

A. No, it is not.

Q. During the time it was so used, did it circulate generally over the area of Lake Texoma?

A. No, it did not. It operated on the Washita, mostly the upper reaches of the Washita.

Q. And the Washita, of course, is over on the Oklahoma side.

A. When I say Washita, if I may I would like to explain it.

Q. I think you had better.

A. It is a colloquialism used on the lake to identify the two branches of Lake Texoma.

Q. You are talking about the Washita Arm of Lake Texoma.

A. That is correct, sir.

Q. And about how far would it be up the Washita Arm of Lake Texoma?

[fol. 152] A. Possibly three miles above the Roosevelt Bridge.

Q. And about how far would that be from the boundary line between Oklahoma and Texas down there in the middle of the lake somewhere?

A. 16 or 17 miles.

Q. And about how far would it operate over toward Texas from the Oklahoma boundary out there in the lake?

The Court:

Pretty thin margin of operation, wasn't it? A mile would cover it, wouldn't it?

A. I believe so.

The Court:

Less than a mile in places, wouldn't it? They didn't have 20 inches there at that east part of the Preston Peninsula. I mean along that high bank where Hannah's place is?

A. That is correct, but the old Moulton very seldom got that far down.

The Court:

It couldn't. It wouldn't have over 20 inches. Not over a mile from there to the dam at the widest point.

A. As long as you stay away from the island there at Burns Run you have got a pretty deep channel.

The Court:

Do you know where that river run before the dam was built?

A. Yes. It run right along Hannah's place, and come along the tip of the peninsula.

[fol. 153] The Court:

Well, the Moulton never did get south of that old river bridge there?

A. No sir.

Q. Would the Moulton get south of the Texas-Oklahoma boundary line is what I am getting at?

A. No.

The Court:

It might down there at the dam.

A. It got over in my bay one time, but it backed out.

Q. Your bay is over on the Texas side, isn't it?

A. Yes sir.

Q. Your bay is south of the Texas-Oklahoma boundary?

The Court:

Yes, it got across the line. There is no question about that, but it didn't in the main body of the lake to speak of.

A. If I may interrupt, stop me whenever you want to. I don't know what you are driving at.

The Court:

He is trying to show that it got across the boundary between Oklahoma and Texas. It did that. It was across the boundary when it was at your place. But in general its operation was along the Washita Arm which is north of line.

A. In the first place, the boat wasn't seaworthy. They didn't dare take it out in the lake, unless it was quiet.

[fol. 154] Q. About how far east and west did the boat travel on Lake Texoma?

A. I have never known it to get out of the main portion of the lake.

Q. That would be about that six mile strip.

A. Yes.

Q. If I understand your testimony correctly,—if I don't you tell me I don't—this boat you are talking about, the

Pirate, formerly the Moulton, carried passengers for hire out there and it went a total distance north and south of roughly about 17 miles, about a mile on the Texas side, and about 16 miles up into Oklahoma, and it would also take a distance of about six miles east and west in the main body of the lake.

A. Well, let's qualify that six miles. In the first place, on the Oklahoma side there in the main portion of the lake the water is too shallow for it to get in to, so it had to go pretty well west of the main body of the lake and it would circle and go on back up to the Washita.

Q. It would take a circling trip to get in the main arm of the Washita, and go up the 16 miles you testified about. I believe that is all.

The Court:

Has it ceased operation now?

A. Beg your pardon.

The Court:

Has it ceased operating?

A. Yes sir. It has. I am not sure whether they are going to attempt to recondition it or not.

[fol.155] The Court:

But it hasn't been in active operation for sometime?

A. No. I would say five months.

The Court:

And so far as you know that is the only boat that carried any passengers for hire?

A. Outside of small speed boats.

By Mr. Keith:

Q. The reason it is not carrying passengers for hire is because the boat itself has become unseaworthy; is that correct?

A. That is right.

Re-direct examination.

By Mr. Gullett:

Q. They brought the Moulton up there, as I understood a while ago, it was brought up by railroad car, wasn't it?

A. That is correct.

Q. And moved over the dam.

A. It was brought into the Engineer's Spur and moved over the dam; that is correct.

Q. It was brought in by railroad to the Engineer's Spur and then moved over the dam. Is that correct?

A. That is correct.

The Court:

He said it was brought over by inland transportation.

(Witness excused.)

[fol. 156]

COLLOQUY

Mr. Alexander Gullett:

The plaintiffs rest, Your Honor.

The Court:

All right. Are you gentlemen ready to proceed?

Mr. Keith:

May we have a few moments, Your Honor?

The Court:

Well, how long do you think your testimony will require, Mr. Keith?

Mr. Keith:

I think it will require less than a day, Your Honor.

The Court:

Do you have much additional testimony?

Mr. Gullett:

I don't think so, Judge.

(Whereupon Court adjourned until 10 a. m. 12/29/49, and the following proceedings were thereafter had:

The Court:

Are you gentlemen ready to proceed in this matter?

Mr. Keith:

Yes, Your Honor.

The Court:

All right.

[fol. 157] Mr. Keith:

First, Your Honor, on yesterday, as I understand the record, the depositions of F. B. White and E. H. Rossow were just introduced in their entirety by the plaintiffs, and we reserved an objection to each question and answer separately on the ground that the matters were not within the pleadings, not relevant to the pleadings. Now, at this time, having had an opportunity to go into these things separately, I would like to make some specific objections and motions to strike with reference to certain of the exhibits which are attached to these depositions, to the deposition of the witness Rossow.

The Court:

All right.

Mr. Keith:

Rossow Exhibit No. 37, is a telegram of February 25, 1949, from R. L. McKinney Agency to H. H. Cleaveland Agency, reading: "Wanderer: Policy number YA 28579 Wilburn Brothers burned today. Advise if you want us to get adjuster on it. R. L. McKinney Agency." We object to that because it is immaterial to any issue in this case, and it is hearsay as to the defendant.

The Court:

Well, isn't it notice of the loss?

Mr. Keith:

We object to it as being hearsay as to the defendant, Your Honor.

[fol. 158] The Court:

Well, I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

There are certain pencil notations.

The Court:

Well, those pencil notations, unless they are identified as to the source, will be eliminated.

Mr. Keith:

Along similar lines there is another exhibit, being Rossow Exhibit No. 38, of February, a copy of a telegram from H. H. Cleaveland Agency to R. L. McKinney Agency, stating "Have contacted Fireman's Fund regarding loss of Wanderer. They are contacting General Adjustment Bureau, Dallas. H. H. Cleaveland Agency", Dated February 25, 1949. We make the same objections to that, it is immaterial and irrelevant and hearsay as to the defendant.

The Court:

Tell me who the Cleaveland Agency is.

Mr. Keith:

That is the agency through which the policy was issued.

The Court:

And they represented the Firemen's Fund?

Mr. Keith:

They were agent of Firemen's Fund while Marshall and Shuler had it.

[fol. 159] The Court:

Do you deny the truth of the telegram?

Mr. Keith:

I don't deny that the telegram was sent.

The Court:

I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

Next one is letter of August 6, 1948, from R. L. McKinney Agency to H. H. Cleaveland Agency, and in addition to the objections which we made yesterday to the letter in its entirety, that it is not relevant to any of the pleadings, not within the pleadings, I want to level a particular objection to two separate parts of that letter. One being a sentence in the third from the last paragraph, reading as follows: "It might be that the Firemen's Fund will want their Dallas Marine man to inspect the boat when this work has been completed.", as being immaterial and being hearsay.

The Court:

Well, what is the whole—who is the letter from?

Mr. Keith:

I am sorry, Your Honor. It is from R. L. McKinney Agency to H. H. Cleaveland Agency, dated August 6, 1948.

The Court:

Notifying them about these alterations and repairs?

[fol. 160] Mr. Keith:

It follows a statement saying that, "These insureds are doing some slight remodelling including the installation of a Marine diesel engine to replace the gasoline engine which has been on the boat."

The Court:

I will overrule your objection and allow you an exception to that ruling.

Mr. Keith:

We next object to the next to the last paragraph in its entirety reading as follows: "We have been considering representing the Firemen's Fund for some time and recently made arrangements to represent them and will be glad to contact the Dallas Office if you so desire in this respect.", for the reasons that it is hearsay and constitutes an attempt to prove——

The Court:

Read that again. I want to hear that.

Mr. Keith:

"We have been considering representing the Fireman's Fund for some time and recently made arrangements to represent them and will be glad to contact the Dallas Office if you so desire in this respect."

The Court:

I don't know about that part about recently made arrangements to represent them; unless that is connected up I will sustain the objection to that, because I don't think any agency can be shown by the declarations of the agent.

[fol. 161] Mr. Keith:

Yes sir.

The Court:

I will sustain the objection to that unless it is connected up and the fact of agency is shown otherwise.

Mr. Keith:

Now, we next object to the Rossow Exhibit No. 40, which is a letter of February 25, 1949, from R. L. McKinney Agency to H. H. Cleaveland Agency. We object to the letter as a whole, because it is self serving.

The Court:

What does the letter say in substance?

Mr. Keith:

The letter——

The Court:

Just notifies them about this loss?

Mr. Keith:

Tells them about the loss and contains a lot of recitations in here about how the loss had occurred, what was done and what was known. In other words, it is a recitation of unsworn facts.

The Court:

Well, to the extent that that letter notifies them of the loss, I will overrule your objection and allow you an exception. As to the other, it is probably not material and probably not admissible, and won't be considered unless it is relevant [fol. 162] and its relevancy is pointed out by the other side.

Mr. Keith:

Then we object to Rossow Exhibit No. 41, which is a signed copy of a letter from R. L. McKinney Agency to H. H. Cleaveland Agency, dated May 23, 1949, some few months after the loss, and it is taking up various arguments and so forth about the question of the loss, and we consider the entire letter to be self serving and argumentative and being in point of time wholly immaterial, being communication long after the loss here.

The Court:

Well, is there anything about the proof of loss?

Mr. Keith:

I don't believe there is, Your Honor. No sir. There is nothing about proof of loss.

The Court:

I don't see where that would be material, and unless it is shown to be by the other side, I will sustain the objection to that.

Mr. Keith:

All right, sir. Then we object to Rossow Exhibit No. 42, being a copy of a letter from Mr. Rossow to R. L. McKinney Agency of May 27, 1949.

The Court:

But there is one thing about that letter there that I think is probably admissible, and that is the fact that these representatives of this defendant of yours had notice of the fact [fol. 163] of loss. That is the only extent, but I think that is shown independently and by other evidence, but that is the only purpose for which it could be admissible or will be considered by me. Go ahead. What is the next one?

Mr. Keith:

The next one is Rossow Exhibit No. 42, letter of May 27, 1949, from Mr. Rossow to R. L. McKinney Agency. It is a copy of that letter, and it acknowledges receipt of the exhibit to which we have just objected.

The Court:

All right. To the extent that that shows the fact of knowledge of the loss and claim that was being made for loss, I will admit it. Otherwise, it is probably immaterial.

Mr. Keith:

We object to Rossow Exhibit No. 42, which is a letter from McKinney to Cleaveland Agency of July 8, 1949, for the same reason we have heretofore stated.

The Court:

What does that letter say?

Mr. Keith:

It just says "We would appreciate having any information you have been able to obtain about the status of the loss. We have been under criticism and haven't been able to get any information", and so forth. I don't see where it is material.

[fol. 164] The Court:

I will just consider that for the purpose of showing they had notice of the loss.

Mr. Keith:

All right, sir. And otherwise it will be inadmissible, is that correct?

The Court:

I think so.

Mr. Keith:

We object to Rossow Exhibit No. 44 being a letter of October 21, 1949, being a letter from McKinney to the Cleveland Agency, reciting that Mr. McKinney had misplaced some claimed letter of transmittal and asking for a copy of it to be sent to him, as being irrelevant to any issue in this case.

The Court:

Is that anything relating to the forms for proof of loss?

Mr. Keith:

No sir. It said, "We have misplaced in our files our letter of transmittal." It says, "1. on the survey" of the Wanderer, was asking for a copy of the letter.

The Court:

And that survey is the Exhibit which has already been offered in evidence. Is that that survey of December, '48?

Mr. Keith:

Yes sir. That is the one that is apparently referred to.

[fol. 165] The Court:

Well, the only purpose that will be considered for will be the fact of showing that they had notice of that proof of survey.

Mr. Keith:

Well, we object to it for consideration on the ground that it is hearsay and self serving.

The Court:

Well, it is not—it is a statement—if it contains any statement by your—

Mr. Keith:

It is an unsworn statement that occurred long after the loss.

The Court:

Well, there is already evidence in the record that Rossow had that copy of that proof of survey. That letter probably wouldn't be admissible for any purpose on that. Now, go ahead if there is anything further.

Mr. Keith:

We object to Rossow Exhibit No. 45, being a letter of October 25, 1949, from McKinney to H. H. Cleaveland Agency, with further reference to that letter we have just talked about, saying they apparently didn't make themselves clear in that, and that they find no letter of transmittal in the file and would appreciate sending this information. We object to that for the same reason we did the preceding one.

[fol. 166] The Court:

Well, I don't see where that has anything to do with it. It is all shown independently and prior to that time.

Mr. Keith:

We object to Rossow Exhibit No. 46, being a copy of letter of October 27, 1949, from Rossow to the R. L. McKinney Agency, stating that this letter we have just been talking about of October 21, 1949, had been sent on to the Firemen's Fund Insurance Company. We object to that as being irrelevant and not within the pleadings.

The Court:

Well, the only purpose of any of that, the only ground of admissibility is the fact that they had notice of this loss, and that is the only purpose for which any of that correspondence will be considered. Now, is there anything else?

Mr. Keith:

Yes sir. There are two or three more of these. We object to—You see, Your Honor, to explain this, the question was—a cross interrogatory was merely asked to just include all correspondence. That is the reason for all this mass being here and our having to go at it in this fashion. We object to Rossow Exhibit No. 47, being copy of letter from E. H. Rossow to Firemen's Fund Insurance Company, of March 2, 1949.

The Court:

1949?

[fol. 167] Mr. Keith:

Yes sir.

The Court:

What does that letter say?

Mr. Keith:

It says, "We are now enclosing a copy of the letter which we received from McKinney Agency outlining the circumstances surrounding the fire." Of course, that is an unsworn statement, hearsay.

The Court:

Well, I am going to admit that for the purpose of showing that this defendant had notice of the loss and only for that purpose.

Mr. Keith:

And there are a number of unidentified pencil notations on there.

The Court:

Well, unless they are connected up, why, they will be disregarded.

Mr. Keith:

All right, sir. Then we object to Rossow Exhibit 48, being copy of letter from Rossow to Firemen's Fund of

May 27, 1949, which transmits the original of a letter received by Cleaveland Agency from R. L. McKinney agency, and asked them to return a correspondence file.

The Court:

Asking them to do what?

[fol. 168] Mr. Keith:

Asking them to return a correspondence file.

The Court:

Well, is there anything in there about form of proof of loss or not?

Mr. Keith:

No sir, there is not.

The Court:

Well, I will admit that and consider it for the purpose of showing notice only to the company of the fact of loss.

Mr. Keith:

I believe that this letter was up yesterday, and I am not certain of it. And at the risk of imposing on the Court we object to Rossow Exhibit No. 49, being a signed copy of a letter from L. G. Wilburn, President Wilburn Boat Company, a corporation, and the partnership DBA Wilburn Boat Company, addressed jointly to R. L. McKinney Agency at Denison, H. H. Cleaveland Agency at Chicago, Illinois, and Firemen's Fund Insurance Company at San Francisco, California, inclosing this proof of loss:

The Court:

What is the date of that letter?

Mr. Keith:

That is March 23, 1949.

The Court:

What is your objection to that?

[fol. 169] Mr. Keith:

My objections to it are that it is not, that it does not transmit proof of loss as required by the policy, and it is self serving; that is the objection to the whole. Then we object specially to a statement in the third paragraph, stating "As we have suffered loss of approximately double the value of the insurance carried on the boat" as being a self serving, unsworn declaration.

The Court:

Well, I doubt the admissibility of that, but I will admit the rest of it. Overrule your objection to that and allow you an exception to that ruling.

Mr. Keith:

Now, there are some pencil notations on there that have not been identified.

The Court:

Well, they will be disregarded unless connected up.

Mr. Keith:

And there is a calling card on it too.

The Court:

I don't think we will regard that calling card, unless it is an invitation to this law suit. Go ahead.

Mr. Keith:

I believe that the others have all been covered. Now, on this application and survey for yacht policy, so called, that was introduced yesterday from the Rossow deposition over our objection, there is at the top of it what appears to be a photostat copy of some pencil notations, which [fol. 170] have not been identified, and we object to them.

The Court:

What are those?

Mr. Keith:

"See letter from agent, February 8th." I don't know whether that word is agent or not. "See letter from"

somebody, "February 9, 1949", which does not form a part of the application for survey.

The Court:

Is that letter identified in the correspondence there, letter of that day?

Mr. Alexander Gullett:

Yes, the letter of the 9th is in there, Judge.

The Court:

Well I don't know. If that notation makes anything in that correspondence intelligible and identifiable, I am not going to eliminate that. Was there a letter accompanying that survey or relating to the survey or explaining the survey in any way?

Mr. Keith:

There is a copy of a letter in here, Rossow Exhibit 50, February 9, 1949, from Rossow to Firemen's Fund, which says that they are enclosing with this copy of this letter an application and survey, but this pencil notation is not shown to have been,—when it was put on there, who put it on there or anything else.

[fol. 171] The Court.

It evidently originated in that office. They had the correspondence before them, but that letter itself shows the notice. I don't think the notation has anything to do with it except it correlates it with that letter and I am not going to eliminate that, because I think it does explain what it relates to on the face of it.

Mr. Keith:

All right.

The Court:

And that was, as I understand it, all that was in the possession of your man Rossow, that survey and that letter that he attached as a copy was in his possession.

Mr. Keith:

This letter is a copy of a letter which Mr. Rossow identified as being in his possession, and this other is a copy.

The Court:

All right, unless that is explained by you, I am going to consider that notation.

Mr. Keith:

I want to resume the cross examination of Mr. Frank Wilburn on that matter we had started yesterday.

[fol. 172] J. F. (FRANK) WILBURN, Recalled for further cross examination by Mr. Keith, as follows:

The Court:

You have been over that with him rather fully, but ask him about that exhibit.

Mr. Keith:

This is about that D-25.

The Court:

I understand that.

Mr. Gullett:

I might state in connection with this book about which the interrogation is going to be made, in order to facilitate matters we had the auditors last night go through that book and show what additions are shown in there that were not shown in the original Johnson account just as a matter of facilitating it here. I here now tender it to Mr. Keith, if he would like to see it.

The Court:

What does that show, the items that were not included in the other exhibits?

Mr. Gullett:

Yes sir. Those amounts not included in those original statements.

The Court :

All right.

[fol. 173] Mr. Keith :

I would prefer to go forward in the manner I had proposed.

The Court :

All right, go ahead.

Mr. Keith :

Q. On this Exhibit, Plaintiff's ⁶ (Mr. Keith refers to this exhibit all the way through his examination as Plaintiff's Exhibit 6, but reporter has marked it for identification only as defendant's Exhibit 6), which is identified as D-25 on the taking of your deposition, you testified yesterday, did you not, Mr. Wilburn, that the amounts shown on here as being still owing to your grocery store were not included within Defendant's Exhibit Nos. 1 and 2, did you not?

A. I believe that I did.

Q. Now, as a matter of fact, referring to Defendant's Exhibit No. 2, which I hand you and I hold this Plaintiffs' Exhibit No. 6 before you, I will ask you if it isn't true, Mr. Wilburn, that the various items that are shown by Plaintiff's Exhibit No. 6, being this book called D-25, are listed on what is shown here as Defendant's Exhibit No. 2 down to and including an item of February 25, 1949, of Texoma Boat and Dock Company, \$373.13?

A. Yes, it is. I made an error yesterday on this, and just a part of the book was included in this.

Q. All right. Now, the part that is not included, those are pages that relate to matters that occurred after the loss. That is correct, is it not, beginning March 9, 1949?

A. Yes sir.

[fol. 174] Q. And all the rest of the book relates to matters, expenditures that were made after the boat sank; is that correct?

A. Yes sir.

Q. And all the expenditures that were made up to the time the boat sank are included in this Defendant's Exhibit 2?

A. Yes sir.

Q. Now, inviting your attention very briefly——

The Court :

Now, what expenditures were made in connection with this boat after the loss?

A. Well, sir, I would be glad to read them to you off this book.

The Court :

I thought it was a total loss and it sank out there. Is that correct?

A. Yes sir. There is some outstanding bills that we, that were due on the boat, a few that we paid after the boat had sank, and then there was a barge that we had sold that was deducted from the book and several other items on here that we paid on the bills and credit given on some of the equipment that come off the boat originally before we remodeled it, and I believe it changed the total the sum of somewhere around 1300 dollars more on the book than what Mr. Keith's records showed, although it was put on there after the boat sank.

Q. Now, the biggest item you have got on here after that, Mr. Wilburn, is on June 28, 1949, where you paid to the Citizens Bank over there \$2,259.71 on those two notes.

A. Yes sir.

[fol. 175] Q. And you have included that in arriving at this total of \$4,710.54, haven't you?

A. Yes sir. And this amount of money now, that was drawn out of our business over there and it was charged back to the boat company.

Q. Yes, but the expenditure of that amount of money has already been shown out of the Wilburn Boat Company account, has it not?

A. I believe that is right, yes sir.

Q. Now, this last item on here, the Texoma Boat and Dock Company, of \$373.13, that was just for repairing the boat, damage that had been done to it to put it back in the same condition it was before the damage was done; is that correct?

A. Yes sir. That was a bill paid by me and I turned in a

claim for it to the insurance company and I haven't yet collected on that.

Q. But the purpose of it was just to put the boat back in the same condition it was before it was damaged by that storm.

A. That is right.

Q. Now, on Defendant's Exhibit No. 2, which is largely self explanatory with this notation, but referring to November 23rd, you have an item here, loan \$600.00; is that a loan that was made by the Grocery store, grocery company to the boat company?

A. Let's see. If I could think, I could tell you what that is. I know, but I just can't recall just exactly what that loan was for. I know if I could think.

Q. Do you recall testifying—would it refresh your recollection that you testified on your deposition that according to your recollection at that time that was a loan made by the grocery company to the boat company which was spent by the boat company?

[fol. 176] A. I think that is right.

Q. If that is true, that \$600.00 would likewise be covered by the expenditures on the boat?

A. Yes sir.

Q. I believe, to refresh your recollection, we found a bank deposit slip showing it had been deposited to the boat company's account.

A. I believe that is correct.

Q. This policy of insurance, you had that in your possession up to the time of the loss, did you not, Mr. Wilburn?

A. Yes, I think so.

Q. And had it in your possession for some few months before that?

A. Yes.

Q. That is all.

The Court:

Any other questions.

Mr. Gullett:

Not from this witness.

Mr. Hayes:

Has the plaintiff rested?

Mr. Gullett:

We rest. We have rested.

MOTION OF DEFENDANT TO DISMISS AND RULING THEREON

Mr. Hayes:

Very good. I have a motion under the rule to dismiss the case, because under the facts and the law, the plaintiffs have not shown a right to relief. And on that motion I would like to be heard pursuant to the practice as stated in 170 Federal (2), 233, Circuit Court of Appeals for the Seventh [fol. 177] enth Circuit, and which I quote if I may. "Defendant contends that at close of plaintiff's case his evidence should be taken in the aspect most favorable."—He was the plaintiff below.—"Together with all reasonable inferences."

The Court:

What is the use of citing anything like that? That is true.

Mr. Hayes:

The thing that the Court holds, Your Honor, is that that is not true. May I finish the reading?

The Court:

All right.

Mr. Hayes:

His view is that the Court should have limited its consideration of the evidence to the narrow limits applicable to the consideration of the evidence in a jury case. Upon a motion by the defendant for a directed verdict at the close of the plaintiff's case, appellee takes the position in which we concur that under Rule 41(B) of the Federal Rules of Civil Procedure, 28 U. S. C. A., upon a motion to dismiss at the close of the plaintiff's case, the Trial Court deter-

mines the fact without being thus limited and must weigh and evaluate the evidence.

The Court:

Well?

Mr. Hayes:

In this case the Trial Court was the trier of the facts and in considering the evidence was not bound to view it in a [fol. 178] light most favorable to the plaintiff with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive, citing the Rule and citing the decisions of the Seventh Circuit, the Ninth Circuit and the Sixth Circuit. In accordance with that practice, if I may, I should like to point out to Your Honor in connection with the evidence as it now stands upon the issue of the navigability of this stream, when this transfer was first applied for by the agent of the assured to the Cleveland Agency it was stated by that agent, according to the evidence of the plaintiff, that the Red River was a navigable stream, and that enough water was being permitted to come through the dam to make it navigable, more than enough than was required for power purposes.

The Court:

Where is that in the evidence?

Mr. Hayes:

That is in the testimony which the plaintiff has introduced of Mr. White who was the other party to that telephone conversation, the first one who made the representation to the plaintiff's agent, McKinney. It is at page 4 as the deposition is paged by the reporter taking that evidence. It reads as follows:

"McKinney told me—" No.

"At the mention of Red River, I told him * * *", and so forth, "* * * In my letter of June 4, 1948, to the Firemen's Fund Insurance Company, which was our carrier,

[fol. 179] I outlined the plans, and in this telephone conversation Mr. McKinney told me it was their plan to take the Wanderer down the Mississippi River from Greenville and up the Red River and lock it through the Denison Dam". —This is their evidence—"And use the boat exclusively on Lake Texoma. He advised me further that the Red River was a navigable stream up to this point, because they were letting more than enough water through for power purposes at the Denison Dam. He asked me to contact our carrier, which I assured him I would and did immediately do so and confirmed it with a letter of the same date." The letter of that date, June 4th is attached to these depositions, and is Rossow Exhibit No. 4. This is their evidence. In that letter, as was stated, pursuant to that telephone conversation advice was given to this insurer as a basis for the issuance of this policy. That advice was conveyed by the Cleaveland Agency, to whom it had been given, by the agent of these assureds, that the Red River was at that time a navigable stream, because they were letting enough water through the dam, more than enough for power purposes. The letter repeats substantially what I have said. I will not take time to read it. I have it before me. The information we have is that the Red River is a navigable stream up to this point, because, "They are letting more than enough water through for power purposes at the Denison Dam."

Now, there was considerable discussion that was connected with the important case of Texas against Oklahoma, in which a reference was made to the holding of the Supreme Court with respect to the navigability of the Red River. That case is specifically dealt with. And the [fol. 180] law of the subject is well stated from 311 United States, the case of United States v. Appalachian Electric Power Company. The case, in event counsel has the law Edition, is 85 Law Edition, and at page 243 of the Law Edition. That was a case that was decided with one dissent by the Supreme Court of the United States in 19—The Law Edition doesn't give the date. Another reason I don't like them. Mr. Justice Reed delivered the opinion of the Court.

“This case involves the scope of the Federal commerce power in relation to conditions in licenses required by the Federal Power Commission for the construction of hydroelectric dams in navigable rivers of the United States. To reach this issue requires preliminarily a decision as to the navigability of the New River, a water course flowing through Virginia and West Virginia. The District Court’s findings that the New River was not navigable was concurred in by the Circuit Court of Appeals after a careful appraisal of the evidence in the record. Both Courts stated in detail the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. The respondent relies upon this Court’s statement that: ‘Each determination as to navigability must stand on its own facts.’ And upon the conventional rule that factual findings concurred in by two Courts will be accepted by this Court unless clear error is shown. In cases involving navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions, has entered into consideration of the facts found by two Courts to determine for itself [fol. 181] whether the Courts have correctly applied to the facts found the proper legal tests. When we deal with issues such as these before us, facts and their constitutional significance are too closely connected to make the two Court rule a serviceable guide. The legal concept of navigability embraces both public and private interests. The power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution. The Congress shall have power * * * —quoting a familiar authority—“* * * to regulate commerce among the several states. It was held early in our history that the power to regulate commerce necessarily included power over navigation. To make its control effective the Congress may keep the navigable waters of the United States open and free and provide by sanctions against any interference with the country’s water assets. It may legislate to forbid or license dams in the waters. Its power over improvements for navigation in rivers is absolute.”

Citing authorities. Commerce between Texas and Oklahoma is interstate commerce under the Federal Constitution. The last sentence is my statement. I make it with confidence. I make it with confidence that neither this nor any other Federal Court either has or would hold to the contrary.

The Court :

Well, don't go too strong on that. You may be speaking for other Courts, but you are not speaking for this one yet. Go ahead.

[fol. 182] Mr. Hayes :

Your Honor, I have a cold this morning and therefore I am having to keep my voice up. It is somewhat unpleasant. I hope you will forgive that aspect of my presentation.

The Court :

That is all right. I can hear you clearly but I will do the speaking for this Court instead of you is the point I am trying to get over to you.

Mr. Hayes :

Well, that, Your Honor, is what I had assumed.

The Court :

Go ahead.

Mr. Hayes :

"The navigability of the New River is, of course, a factual question. But to call it a fact cannot obscure the diverse elements that enter into the application of the legal tests as to navigability. We are dealing here with the sovereign powers of the Union. Both lower Courts based their investigation primarily upon the generally accepted definition of the Daniel Ball. In the lower Courts and here the Government urges that the phrase 'susceptible of being used in their ordinary condition' in the Daniel Ball definition should not be construed as eliminating the possibility of determining navigability in the light of the effect of reasonable improvements."

That was the Government's argument below, I interpret it. Continuing with quotations:

[fol. 183] "The district Court thought the argument inapplicable. The Circuit Court of Appeals said 'if this stretch of the river was not navigable in fact in its unimproved condition, it is not to be considered navigable merely because it might have been made navigable by improvements which were not in fact made. Of course, if the improvements had been made, the question of fact might have been different.'"

That ends the quotation of the Circuit Court of Appeals. The Supreme Court goes on:

"To appraise the evidence of navigability on the natural condition only of the water-way is erroneous. Its availability for navigation must also be considered. Natural and ordinary conditions refers to volume of water, the gradients, and the regularity of the flow. A water-way otherwise suitable for navigation is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in Section III of the Water Power Act by defining navigable waters as those which either in their natural or improved condition are used or suitable for use. The district Court is quite right in saying that there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree."

There is a foot note to that statement which reads:

"Thus in the Rio Grande Dam and Irrigation Company case the record contained reports of Army Engineers that improvements necessary to make the river navigable would [fol. 184] be financially, if not physically impracticable, because of the many, many million dollars that would be required."

The Supreme Court of the Territory of New Mexico observed:

"That the navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and expenditures of vast sums of money."

They are referring there and in what immediately follows, and indeed throughout the case, to improvements that have not yet been made as distinguished from the Denison Dam, which is an existing fact. Turning from the foot note back to the text:

“There must be a balance between cost and need at a time when the improvement would be useful. When once found to be navigable a water-way remains so. This is no more indefinite than a rule of navigability in fact as adopted below, based upon useful interstate commerce, or general and common usefulness for purposes of trade and commerce if these are interpreted as barring improvements, nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate water-way available for traffic. Of course, there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly industrialized region may have been entirely too costly for the same region in the days of the pioneers.”

[fol. 185] They are still speaking of improvements which have not been made.

“The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of improvement.

Although navigability to fix ownership of the river bed * * *.”

Citing authorities.

“* * * or riparian rights * * *”

Citing *Oklahoma vs. Texas*, 258 U. S. 574.

“* * * is determined as the cases first cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in Admiralty Jurisdiction which may be extended over places formerly non-navigable. There has never been doubt that the navigability referred

to in the cases was navigability despite the obstructions of falls, rapids, sand bars, carries or shifting currents. The plenary Federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence. It cannot properly be said that the Federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. In determining the navigability character of the New River it is proper to consider the feasibility of inter-[fol. 186] state use, after reasonable improvements which might be made."

And that concludes the quotation. With respect to reasonable improvements that might be made, it seems that this case bears an obvious—if need be, if Your Honor desires it, I mean I could multiply authority.

The Court:

What is that authority you are reading from?

Mr. Hayes:

The case is the United States vs. the Appalachian Power Company, 311 U. S. on page 377.

The Court:

All right.

Mr. Hayes:

In connection with that authority and before leaving it, it seems to make very plain that the decision of such cases as Texas Against Oklahoma are directed to determining navigability for the special purposes for the ownership of the bed of the stream or riparian rights, whereas navigability in the sense of Federal control and Admiralty control over commerce there carried on is directed, according to the authorities, to the possibility of making it navigable by reasonable prudence.

Whereas, we have on this record by the evidence of the plaintiff an undisputed showing that this is navigable interstate water since the erection of the Denison Dam, an [fol. 187] existing improvement, in which the Federal Gov-

ernment would scarcely have been warranted in engaging aside from this doctrine, and over which it would scarcely be warranted in exercising the control which it does warrant except for that doctrine. So a decision holding that it is not navigable waters would disestablish Federal Agency presently being in control as a matter of course.

The Court:

No, it has about as much relation to navigation as these desks in this Court room. It is like a lot of that other New Deal camouflage, it is all power. They had no serious thought of navigation except as an incident to the construction of this dam. You might be right on your authority about it being navigable water, but I am very, very suspicious of it. The doctrine that that seems to announce is certainly correct, that it is not to be limited to the stream and its natural condition; that improvements are to be considered, but the point about it is that it relates to the navigability of the stream, the water highway, and that is what this dam conclusively avoided and prevents, because it is an absolute bar to any possible navigation of the Red River as such, because I developed in my questioning there is no question of locks or means of communication from the river to the lake. That dam,—they had to bring this boat and any other one of any size overland to get it in there, and it is just a myth and an optimistic expression of opinion and not a fact when Mr. McKinney told this company that they were releasing enough water from that dam to make Red River navigable. That is just a delusion and myth, because everybody who lives in this vicinity does know or should know that it hasn't had any more effect upon the navigation of Red [fol. 188] River than one of these neighborhood peckerwoods spitting some tobacco in the stream, that outlet of water from the lake, and you have got water which is navigable in fact in the main body of the lake. That is true. But to my knowledge from local conditions, there is no possibility of even any man seriously entertaining the thought that either the Red River or the Washita where they empty as tributaries in this lake are navigable. That is just foolish. You couldn't navigate them in a pirogue or skiff in the normal state of them, and the periods of abnormal

water flow, during spring freshets and the like; and I think it is just retching and straining at technicalities to try and contort this purely inland lake, because it is composed of rivers that are not navigable in fact and never were into navigable waters of the United States, and if you are right about it, you will prevail. But it doesn't appeal to my judgment, except as another technicality which has been raised to defeat this contractual obligation which was entered into and without prejudice to your right to renew this motion at the conclusion of all the evidence I am going to overrule it.

Mr. Hayes:

Just a moment, Your Honor, I had a few more words I wanted to say.

The Court:

Well, I want to get all this evidence in and finish the case, and at the conclusion of the evidence you can renew it. I am not convinced of it.

[fol. 189] Mr. Hayes:

Your Honor,—

The Court:

When the evidence is in you can renew it.

Mr. Hayes:

Yes sir. I had addressed myself to one thing, which Your Honor has described as a technicality. I don't think what I will, with permission, will now speak out will strike Your Honor in that light.

The Court:

Well, if you have got any substantial defense on the facts, you will be granted that. But I think you are straining at a rather strained construction to try and make this dam locked inland lake navigable waters. You may be right about it. I am not foreclosing judgment. But I want to get all the testimony, and we can do that without any prejudice to any motion you have.

Mr. Hayes:

I appreciate Your Honor's thought. But in line with the authority I read Your Honor, I beg Your Honor to hear me on one more feature of the plaintiff's evidence.

The Court:

What is that?

Mr. Hayes:

May I refer to the so-called applications and survey which has been mentioned a number of times as supposedly giving notice to the company?

[fol. 190] The Court:

Well, we will take five minutes and then I will hear you.

(Proceedings after recess as follows):

The Court:

All right, proceed, counsel. Should I say "proctor"?

Mr. Hayes:

Forgive me, Your Honor.

The Court:

I say should I say "proctor"?

Mr. Hayes:

I am sorry. I have a cold and did not hear.

The Court:

I was trying to be facetious. I said proceed, counsel, or should I say "proctor"?

Mr. Gullett:

Proctor in Admiralty.

Mr. Hayes:

Oh, oh. I referred to the so-called survey, which is head "Application survey for yacht policy", containing this language, being of date somewhere in December.

The Court:

December of 1948.

[fol. 191] Mr. Hayes:

"Particulars of any mortgages or other encumbrances: None". —Now that document was not a notice that there were \$28,000.00 worth of incumbrances against this vessel. It was a matter specifically inquired about. It was answered by the agent of the plaintiffs "None", which was not according to the fact. The fact is stipulated that for months that vessel had been pledged to a bank, first for \$10,000.00, then for \$20,000.00, and then by the corporation which owned it to two of its stockholders.

The Court:

Let me ask you this.

Mr. Hayes:

—for \$8,000.00.

The Court:

Was there anything in this contract of insurance preventing them from mortgaging the vessel?

Mr. Hayes:

Yes sir.

The Court:

What does it say about that?

Mr. Hayes:

It says that "In event the vessel shall be sold, transferred or assigned or pledged without the consent of the—in writing of the insurer", and the stipulation is specific that it was pledged to this bank and also to these two stockholders. And it is specific also that that was without the consent of the insurer, as testified by the witness whose [fol. 192] evidence has been put in as the plaintiff's evidence, Mr. White. That creates a much greater hazard. It is not the same risk. That it is material, it is concluded of course, by the contract which the parties have made,

because as has so often been said Courts do not make the contracts with parties, they enforce those which have been written. These people know what is material to their risk, and I should suppose apart from that doctrine which is a rule of law founded as rules of law generally are, under reason, that it is obvious that a vessel subject to mortgage is subject seriously to a greater moral risk. The Supreme Court's statement on that is particularly clear. The case is *Sun Insurance Office vs. Scott*, 284 United States, 177:

"The respondents instituted five actions in a Commons Pleas Court in Ohio on as many policies of fire insurance. The causes were removed to the Southern District Court of Southern Ohio, where they were tried together, and resulted in verdict and judgment for respondents. On appeal two of these judgments were reversed, and three here under review were affirmed. We granted certiorari. Each suit seeks recovery upon a fire policy issued upon wool belonging to respondents. In each, defense was made that he placed a chattel mortgage in violation of the provision of the policy as follows: 'This entire policy, unless otherwise provided by agreement indorsed hereon and added hereto, if the interest should be other than unconditional ownership or if subject become encumbered by a chattel mortgage.' * * * It is admitted that on June 19, 1926, the respondents executed a chattel mortgage on the insured property to the bank and that the mortgage continued in [fol. 193] force at the time of the fire."

Those matters are all stipulated.

"The policies of the Sun Insurance Office were issued on June 14, 1926. That of the Home Insurance Company bore date of July 6, 1926. * * *

Each of the policies had attached to it a loss payable clause reading substantially as follows:

'Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Company, Cumberland, Ohio, subject nevertheless to all the terms and conditions of the policy.'

These riders were attached by the local agent of the petitioners to the Sun after their issuance; to the Home

policy on the date it was issued. To the petitioners' defense of violation of the chattel mortgage clause the respondents answered:

That the loss payable clause as a matter of law constituted a waiver and a recognition of the interest of the bank. He averred moreover that by custom in the community in which the policies were written such clause was so understood and it was customarily used for the purpose of giving the insurers' consent to chattel mortgages. In the alternative he insisted that under Section 9586 of the Ohio General Code a person who solicits insurance and procures the application therefor must be held to be the agent of the party, company or association thereafter issuing [fol. 194] policy upon such application or renewal thereof, anything in the application or policy to the contrary notwithstanding, and that if the loss payable clause did not have the effect for which he contended, nevertheless the agent who wrote the policies and attached the clause, knew of the existence of the chattel mortgage and his knowledge was to be imputed to the insurers and constituted an agreement on their part that notwithstanding the mortgage, the insurance should remain in force. To this petitioners replied by denying any such customs as alleged and quoted a provision appearing in each of the policies."

Such a provision appears in this policy.

No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement incorporated hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

That ends the quotation from the policy. The Court of Appeals held that under the law of Ohio the chattel mortgage was valid as between respondent and bank notwithstanding it had not been recorded, and would have voided the policies except for the loss payable clause which it held either by its own force or by its customary use for the pur-

pose constituted a waiver and consent on the part of the insurers.

[fol. 195] "On this ground we affirmed the judgment. We are of the opinion that upon the uncontradicted facts the petitioners made out a valid defense to the suit and were entitled to directed verdicts in their favor. The provision in the policies prohibiting chattel mortgages without consent indorsed on policy is intended to reduce the moral hazard and is a valid stipulation, the violation of which constitutes a complete defense."

Citing authorities. I pause there to urge Your Honor not with respect to this matter, but at any rate to consider it as artificial, as technical in the driest sense, in view of the fact that such provisions are recognized by the Supreme Court universally in the insurance law, do go to the moral hazard, and boats burdened with no cargo but with \$28,000 worth of mortgages are very apt or much more apt to sink. The loss payable clause above quoted is not informative to the insurer of the existence of a chattel mortgage, but performs the office of protecting a creditor of the assured who has no interest in the assured's property by mortgage or otherwise against the eventuality of fire loss. They then cite other authorities for it. There is here no loss payable clause. There are here stipulated encumbrances. There is here a plain requirement in the policy it shall be voided unless the consent of the insurer is given in writing. There is here the stipulation that there was no such consent and finally as to the question of notice to the insurer, even were we or could we—were we to or could we disregard the plain provisions of the policy that no waiver can be effective unless it is endorsed thereon in writing—I am speaking of the laws enforced in the Federal Court and other Courts en-[fol. 196] forcing the Admiralty law—there is quite aside from that, and in addition to it and independently conclusively, as it occurs to us, a flat statement in the communication of about the middle of December as to particulars of chattel mortgages, "None". I am not going to enlarge on the necessities of conducting a business according to contracts, because quite apart from argument as to what the law should be in those respects, it is perfectly familiar that the law—that the contracts are enforced by Courts

and not re-made by them. Now, as I said, I have been referring to laws enforced in Federal Court during this complete argument, that this is a marine policy of insurance, which would seem to be too clear for argument once the full state of the authorities is developed. And in performance of my duty to this Court I read to Your Honor from the case of *Panama Railroad Company vs. Johnson*, 264 U. S. 375, quote:

"As there could be no cases of admiralty and maritime jurisdiction in the absence of some maritime law under which they could arise. The provision * * *

I interpolate, referring to the provision of the III Article of the Constitution:

"The provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Federation and was commonly applied in the adjudication of admiralty and maritime cases. It embodies the principles of the general maritime law, sometimes called the law of the sea with [fol. 197] modifications and supplements adjusting to scope and need on this side of the Atlantic. The framers of the Constitution were familiar with that system and provided for it instead. The purpose was not to strike down or abrogate the system but to place the entire system, its substantive as well as its procedural features under national control because of its intimate relation to navigation and to interstate and to foreign commerce."

I interpolate that language is obviously related to that from which I read earlier to Your Honor this morning.

"In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of less light, the provision was regarded from the beginning as implicitly vesting such power in the United States. Commentators took that view. Congress acted on it and the Courts, including this Court, gave effect to it. Practically, therefore, the situation is as if that view were written into the provision. After the Constitution went into effect the substantive law theretofore enforced was not regarded as being abrogated or being only the law

of several states, but as having become the law of the United States, subject to power in Congress to alter, qualify or supplement as experience or changing conditions might require."

That states may not change that law is a familiar doctrine. In the case of _____ vs. _____, 240 West 273, [fol. 198] "A contract of marine insurance is a maritime contract." Quote from the Belfast case, 7 Wallace 624, 637:

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts. * * * Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation are cognizable in the admiralty. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty Courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality."

In *The New England Marine Insurance Company vs. Dunham*, 78 U. S. 90, it was held that a contract of marine insurance is a maritime contract.

The Court said—this is the leading case:

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises, by which it is governed. It is well known that the contract of insurance sprang from the law of maritime and derives all its material rules and incidents therefrom."

The Court, I interpolate, traced the history supporting that statement, and concluding:

"That a contract of maritime insurance is a maritime contract", said and I quote:

[fol. 199] "It is in fact a part of the general maritime law of the world, slightly modified, it is true, in each country according to the circumstances."

Can stronger proof be presented that the contract is a maritime contract? I now quote from 49 Federal 2nd, 121, a case decided in 1931 by the Circuit Court of Appeals for the

Fifth Circuit. Certiorari was denied in 284 U. S. 628. I quote:

"Policies of marine insurance are governed by the general admiralty law. In construing them we prefer to follow the decisions of the Federal Courts and other admiralty Courts and put aside decisions of State Courts where they are in conflict."

The Court continues:

"Federal Courts look to the laws of England for guidance in matters of marine insurance and follow them, unless, as a matter of policy, a different rule has been adopted". Citing authorities.

"With regard to express warranties there is no difference that we are aware of."

The clause in this case was an express warranty. The English rule is that—

The Court:

What are they dealing with there?

Mr. Hays:

Pardon.

[fol. 200] The Court:

What are they dealing with there in that decision?

Mr. Hayes:

That was a maritime policy in which the express warranty was involved. This is a commercial risk I am speaking of now involved in that case, and the policy carried a warranty that there should be at all times a watchman on board. Of course, what we have here is a pleasure risk and the yacht policy did not carry that warranty, because it carries first the warranty that it shall be for pleasure use, and then the express stipulations that there shall be neither pledge nor sale.

Arnold on marine insurance is cited. Federal Courts have generally adopted this rule. In perhaps the first reported case on this, *Genter vs. Nash*, which held that a war-

ranty of this kind must be strictly complied with. A case in the Seventh Circuit, *Fidelity Phoenix Insurance Company vs. Chicago Title and Trust*, 12 Federal 2, at 573. The Court said:

“In the view we take of this question”—

That is the breach of the policy.

“It will not be necessary to note the other conditions. The rule is that a breach of express warranty in a policy of insurance bars the recovery whether it caused the injury or not.” Citing *Arnold Marine* and other authorities. The Court continued:

“The terms of the policy constitute the measure of the insurer’s liability”.

[fol. 201] I interpolate there and beg Your Honor to consider that it is a—it is upon that statement of the law that premiums are computed, and unless it is enforced, then no actuarial practice is anything but a diversion for idiots unless the terms of the policy are enforced as the limit of liability.

“The terms of the policy constitute the measure of the insurer’s liability and in order to recover the assured must show himself within those terms. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery.”

Citing authorities. United States Supreme Court and from the Supreme Judicial Court of Massachusetts. Another—I can, and if Your Honor desires, I will multiply authority for these propositions. They are perfectly well settled. Now, I have been speaking on the proposition that this case is governed by the admiralty law.

The Court:

I understand that.

Mr. Hayes:

And I appreciate—

The Court :

And if it should be decided— —

Mr. Hayes :

Pardon me.

[fol. 202] The Court :

If it should be decided that this is not a maritime contract, your authorities probably don't have any persuasion whatsoever.

Mr. Hayes :

I was about to say something addressed precisely to that point, Your Honor.

The Court :

All right, go ahead.

Mr. Hayes :

This policy was mailed from Illinois,—that now appears by the plaintiff's evidence, and a policy is delivered when it is mailed. As I need not repeat, the law which governs that policy, if it is not the admiralty law, is the law of Illinois, where I have been admitted to practice for more years than I now like to count, and which Your Honor knows, as all Federal Courts know the law of all states, judicially, and which I can state to Your Honor, is that there is no modification of the effect of stipulations such as these that we have been discussing in contracts when they are contracts of marine or transportation insurance. Now, whether or not this particular vessel was on admiralty waters does not control the question.

The Court :

Well, you might have something there. That is the thing that has been concerning me most, is the fact that this contract was issued originally, when it was, subject to maritime jurisdiction, because it was issued, as I understand it, when [fol. 203] it was on the waters of the Mississippi River. Is that correct?

Mr. Hayes:

That is correct.

The Court:

Now, that is where you have got something to talk about, admiralty there. I realize that. I have realized that throughout the development of all of this in spite of all this attempt to construct our admiralty jurisdiction on the Texoma Sea. Now, that is where the strength of your position is about your claim of this being an admiralty contract, or a maritime contract, but go ahead. Now, let me interrupt you long enough to ask you, do you intend to rest your case on this testimony which has been adduced, or do you intend to offer any additional testimony? The only thing I want, and you can do it without prejudice to your case, is to develop all the testimony and in the light of that, let this argument be made. But what is the character and trend and length of testimony you propose to offer, if any, if we go on with this testimony? Now, if you are going to rest on their evidence, why we can go ahead and I will listen to you until you are through, but I am anxious to conclude this testimony and get the whole record completed before I make any decision affecting the merits, if that can be done. I get your position fully as far as you have stated it, but if you have anything further, go ahead. I would like to get through, all the testimony that is going to be offered in the record. Put go ahead if you have any further argument to make at this time now.

[fol. 204] Mr. Hayes:

Thank you, Your Honor. There is the further consideration that the owner of the legal and equitable interest in the subject of insurance at the time of the loss, who became such owner in violation of the express terms of the policy forbidding sale, was an Oklahoma corporation. That I think is stipulated, included in the stipulation. Now, the suggestion that has been by inference urged upon Your Honor, and which Your Honor has now, and then indicated that you included in your consideration along with every other possibility while the case was still in trial, was the suggestion that perhaps this contract was governed by the law of the

State of Texas. I have indicated reasons for believing as I do that it is governed by the general¹ admiralty or maritime law. I have indicated reasons for believing as I do that it is governed by the general law of insurance as a maritime contract, regardless of what these waters were. Your Honor has indicated that the issuance of that contract while the vessel was on navigable waters is a significant thing, if like others, it would be the law of the state here. If that contract shows to be delivered in Illinois, why not the law of Illinois, under which these terms and provisions have their full force and effect in every marine and transportation contract, or why not the law of Oklahoma? This contract insured an interest which at the time of the loss was owned legally and equitably by an Oklahoma corporation. Under the law of Oklahoma warranties and other express provisions in contracts such as these we have been considering have their full common law effect. There is no statute in Oklahoma for example, saying that no matter where a policy of insurance is issued, no matter where the insurer is, no matter what [fol. 205] the incidents of the risk may be, regardless of whether the vessel is to be used in interstate commerce as indeed vessels are made to be used and was used under this policy, regardless of where the insurer was, regardless of the making and delivering of the insurance, regardless of anything else, if you insure anybody in Oklahoma, it has got to be the Oklahoma law. The law doesn't say that. It says in no state that I know of except Texas, and I urge upon Your Honor very strongly this further consideration that to construe that state law of Texas or the other laws of Texas as applying so as to rule this situation, would be to claim an extra-territorial effect for them. To do so, to construe those laws as applicable here would be to violate the concept of due process of law made binding upon the states by the 14th Amendment to the Federal Constitution. There is an immense body of authority behind that statement. Here is a vessel that was in Greenville, Mississippi, when this contract was made. And it was a vessel that went places. It wasn't meant to sit still. It came through the State of Oklahoma. It was hauled around on the Oklahoma side, brought across to the Texas side. Then put into waters which border on two states and kept most of the time at a home berth.

That is so testified. It was located in Oklahoma and in Oklahoma it burned and there isn't a word of evidence to indicate that it ever was in Texas except as it may have crossed the state line in going to and from its home berth and to come over here for purposes of repair. That relation for the State of Texas to undertake by its law to govern that vessel, that relation, would be to violate the provisions of the Federal Constitution with respect to due process, to which I have referred. Now, as to the sale of this vessel, [fol. 206] Your Honor was considering the question of whether or not you could go through the corporate entity in order to do justice. There used to be a saying in the days when English chancery was unformed that equity was the length of the chancellor's foot. Unless there is provided by law a standard by which justice may be determined, then to say that a Court of law will go through the corporate entity in order to do justice is to say that the Court will do what is right in its own eyes. We all know that is not so. It is just according to the law to enforce the contracts that parties have made. Justice under the law is the concept which the Courts of the United States have enforced since the beginning, and it is that law that justice requires that the parties, the contracts which parties have made shall be the measure of their rights and not some revision of them, no matter how the revision might appeal to some one else. The parties are the judge of the significance of the provisions that govern their own relations when they are made explicit in a written document. I am fully aware, of course, of a number of state decisions which have more or less taken the view of "Oh, well, of course, he probably didn't read his policy." Something approaching to that.

The Court:

Well, they do have a good deal of fine print sometimes, don't they?

Mr. Hayes:

The doctrine of the Courts of the United States quoted universally is this:

[fol. 207] *Lumber Underwriters vs. New York Life*, 254 U. S. 605 quoted and applied in 60 Federal 2nd, 239, at 240, to insurance policies:

"No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party. What the assured cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms."

That ends the quotation. There has never been any departure from that doctrine.

The Court:

You know, believe it or not, counsel, I am familiar with that doctrine.

Mr. Hayes:

Pardon me.

The Court:

They are charged with notice of the contents of any contract they entered into. There is no use of taking up time on anything like that.

Mr. Hayes:

Therefore, with respect to going through the corporate entity, unless justice is to be an entirely formulalious thing, not governed by law, justice consists of enforcing the contract and if the contract is enforced, then the sale to the corporation is the end of this law suit, because there is absolutely nothing in this so-called notice to the company about [fol. 208] any sale to any corporation, nor else where. Your suggestion as to going through the corporate entity took me by surprise. I tried to locate something quickly that would bear on it. I have here the case of *Strauss vs. the Dubeck Fire and Marine Company of Dubeck*, and let me say I didn't find this case. It was Mr. Keith who found it, although we were both looking for it. 22 Pacific Reporter 2nd, 582. I read the headnote No. 2.

"Owners of corporate capital stock named as insured in fire policy covering corporation's property required insured to be unconditional and sole owners, not held entitled to disregard corporate entity to recover."

The suggestion of going to the corporate entity in such a situation as this is, so far as I know, is supported by no authority whatever, and is contrary to the explicit terms of the authority which I read. I would like to, if I may, read——

The Court:

Counsel, that was just a suggestion that was borne out by this testimony, that these three partners were the only owners of the stock in the corporation, and the suggestion that under some circumstances, where it is necessary in order to do justice, that the corporation fiction will be disregarded. I didn't intend to alarm you to the extent of expressing any judgment that would necessarily control in this case, that is a very salutary rule, where it can be done, and where it should be done in order to do justice to disregard the corporate fiction. I don't know whether it has application to this situation or not, except the identity of [fol. 209] interest between the members of the partnership and the owners of the stock in this corporation are identical, but go ahead.

(Recess at this point.)

(Reporter changes Stenograph machines due to fact the one he was using was not working properly.)

The Court:

All right, Mr. Hayes, are you ready to proceed now?

Mr. Hayes:

Yes, Your Honor. We have concluded to let the record close now on both sides.

The Court:

All right.

Mr. Hayes:

There is one important correction of fact, we were both under misapprehension this morning as to a date. Your Honor suggested to me that the date associated with this survey was the middle of December. I think you said December 14th.

The Court :

That was my impression.

Mr. Hayes :

We were in error, sir. The December 14th letter is a letter that says the Wilburns have \$40,000.00 invested in the boat. There was, as a matter of fact, not even a request for a survey at that time. The reason for issuing the binder [fol. 210] effective December 20th, which is the date of a telephone conversation between the Cleaveland Agency and the Firemen's Fund, in which the Cleaveland Agency conveyed to the Firemen's Fund the information given in the letter of December 14th, including the \$40,000 supposed investment, which we challenge. I say the reason for issuing the binder on that date is amply explained not only by the fact that it was issued on that date, dated effective as of that date, but also the method of writing pleasure risks on hulls is covered by plaintiffs' testimony, their witness White, who explains that with respect to pleasure hulls, they are written entirely on a good faith basis, and the information conveyed by the insured is assumed to be accurate and complete. The only date that is associated in any way directly or indirectly with that survey is the date February 9th. I believe that there was a letter written on February 9th from the Cleaveland Agency, and that letter had an enclosure which was a survey, and that letter is referred to by the plaintiffs' witness Rossow as the one that is associated with the enclosure of that survey. The Firemen's Fund Insurance Company, according to the address, whether it would have gotten there, we don't know on this record. The date is of some significance perhaps. Perhaps not. At any rate, February 9th seems to be the only date associated with it. It is associated with it in that way. The \$40,000 increased coverage was asked for in December, bound in December, the indorsement was effective in December; the date is December 20th. Referring to that survey, the only thing in any respect directly or indirectly claimed here to be a notice of any kind to the insurer, respecting the ownership of the vessel, it says Wilburn Brothers, Address, Denison, Texas. The fact that the owner legally and equitably was an Oklahoma corporation——

The Court :

Well now, that is just the point that I had in mind about these observations that I have made. Any way you want to construe that, whether it is intended to represent the partnership or whether to represent the Wilburn Brothers individually, they were the beneficial owners of it at that time whether as individuals or through stock ownership. That becomes material upon the question whether there was or was not misrepresentation, but that is the record.

Mr. Hayes :

Your statement, Your Honor, I think——

The Court :

Well, I understand your position about it.

Mr. Hayes :

You said they were beneficial owners. A partner is a proprietor, a stockholder is not.

The Court :

Well, they owned all the stock. You can't get away from that, but I understand. I am not arguing with you, and I am not announcing any judgment, but you construe that as a misrepresentation, and it might be, but go ahead from there.

Not only misrepresentation, Your Honor, but concealment.

[fol. 212] The Court :

All right.

Mr. Hayes :

This policy states expressly that any concealment shall void it. A case which I had occasion to mention this morning and cite was a case in which the name of the party was improperly stated. The averments of the plaintiffs were that they were the owners of the property. The truth was that the property was owned by a corporation. The plaintiffs owned all the stock in the corporation. The Court said:

"It is concealment to neglect to communicate that which a party knows and not to communicate it. One certainly knows his own name."

These plaintiffs did not state their names. The name they did state was both a concealment and a material misrepresentation.

The Court :

That is that Pacific Reporter case?

Mr. Hayes :

It is, sir.

The Court :

All right, sir.

Mr. Hayes :

As far as I am aware, that is uniform authority. I should like to refer to some of the Federal authorities which I neglected to bring over. I had rather a big armful on the doctrine of concealment. They are extensive. That this [fol. 213] was concealment is rather plain and the testimony of the plaintiffs with reference to that, the deposition of their witness White, who had been in the insurance business, including the marine end of it, for many years, since in fact 1928, he said in answer to the question:

“What effect if any, does the provision seem to read: ‘This entire policy shall be void if the insured has conceded or misrepresented any material fact or circumstances concerning this insurance’ ”.

The rest of this paragraph is on the risk and premium.

Answer: “The question contains the word ‘conceded’. It should be concealed. All hull coverage is written on the basis of good faith, and honesty. The word of the assured or his representative is accepted as truth and completeness as to all exposures that might affect the risk and the company assumes and promulgates their rates and coverage based on this information and the assumption of its accuracy and completeness.”

Testifying further, he says with reference to the provision as to sale,

“What significance, if any”—question—‘does the provision seem to read, ‘It is also agreed that this insurance shall be void in case this policy or the interest of the assured thereby shall be sold, assigned, conveyed without the previous consent of the insurer in writing’ ”?

[fol. 214] Answer: “The insurance was originally issued for the insured interest shown on the contract. Rates were promulgated accordingly, but with an assignment or transfer of interest the risk immediately changes complexion. As to pledge, as, for instance, by chattel mortgage or other encumbrance, the risk assumes a hazard entirely different from that originally contemplated and certainly a risk that’s much greater. These conditions create definitely a moral hazard.”

Now, with respect to that provision as to sale, the thing that the evidence shows, and which the Courts recognize, is that moral hazard is important to the insurer. The evidence is as goes to moral hazard, I have read it, some of it, the significance of it with respect to moral hazard must be apparent on reflection when a vessel is owned by a corporation, for example. The only purpose of doing that would seem to be to limit the liability of the assured. That affects the maintenance of the vessel. And the transfer of interest to another interest, particularly corporate interest, is a characteristic of the kind of transaction that the insurer immediately wants to look into. At any rate, the uncontradicted testimony that it goes to moral hazard can hardly be thrown away. The provision is express in the contract. We were speaking this morning of the various kinds of technicalities. That shall be suggested as competitors to the rule in this case. I suppose the thing that may have been in the Court’s mind when it referred to that, when it was first spoken of, as perhaps a dryly technical consideration. That was before I had read this evidence. May have been that the sale of the boat doesn’t physically set boats on fire. It doesn’t physi- [fol. 215] cally set them on rocks or break their ribs and planking. I suppose that one feature of the Texas law that may have been in your mind was that feature that requires that any breach in the policy must contribute to the loss before it can be relied on by the insurer, a feature which is not the law of the other jurisdictions which I have men-

tioned, which proceed under the doctrine that a man cannot proceed under a contract which he has broken. And the provisions of the Texas law which cannot by their breach—it is held as to those provisions, the Statute of Texas, requiring that the breach contribute to the loss has no application. As for example, an undertaking to pay notes on policies. That doesn't contribute to the loss. The fact that the insured was broke and probably couldn't pay the notes. That may bear on the moral hazard, yes, but it doesn't physically contribute to the loss. As to such a condition as I have described, the Texas Court held, 263 S.W. 659, I quote:

"It is believed that article * * *" so and so, statute I referred to "* * *" does not have application to the provision in the suit, since the subject matter of said stipulation from its very nature could not of itself contribute to bring about the destruction of the property by fire. As frequently held * * *" Article so and so. It has reference only to those warranties and provisions, the breach of which might contribute to or bring about a fire loss. It has no application to provisions, violations of which could not from their very nature contribute to or bring about the destruction of the property by fire." So whether this case was covered, as I believe it to be, by the admiralty law, as a maritime contract, or by the Illinois law, the law of the place where it was de-[fol. 216] livered, by the law of Oklahoma, the place where the plaintiff, who is the legal and equitable owner of the property, resides, moves and has its being and by whose law it was created or even by the law of Texas, which I think clearly does not apply, but if it were to apply, still the statutory situation as in this state would not permit a recovery by the plaintiffs under the uncontradicted record as they have made it.

The Court:

Well, now, before we go any further. Will you please tell me whether or not you intend to offer any evidence? You are going to close the record on this as it is or what are you going to do about that? Because as I told you, if there is any more testimony, I want to take it before we have this final argument about the law.

Mr. Hayes:

Yes sir. The plaintiff has rested. In view of that, I stated,—I perhaps didn't make it plain—that we have decided to let this record stand as it is, as the plaintiff has made it.

The Court:

All right. Now, with that understanding, go ahead and proceed with your argument then.—Now, there is one thing that I can say to you now. If this is to be regarded as a maritime contract, I don't think there is any question but what you would and should prevail in this matter; and, of course, I have the apprehension generally that maritime contract is not to be governed by the locality where it was entered into, but it inheres in the nature of the contract, but [fol. 217] the general test of it is simply whether or not it is a contract relating to the navigation and commerce and business of the sea. Do we have any different understanding than that about the nature of a maritime contract?

Mr. Hayes:

Your Honor said at sea.

The Court:

Well, I mean navigable waters within that meaning. It doesn't mean technically a body of the outlying water such as is technically at sea, but the navigable waters, if you will, within the meaning of the Constitution. Now, do we have any difference in understanding about our belief and appreciation of what is the nature of a maritime contract?

Mr. Hayes:

If I understand Your Honor's statement, I believe we have none, sir.

The Court:

Well, I think that is correct. But before you go any further, I am going to hear from these gentlemen about what they think is the nature of this contract. You have stated your position very clearly and very fully and I understand everything that you have said, and I would like to hear from

them on what they think they have here in the way of a contract, the nature and the place of it. Are you gentlemen ready to proceed on that?

[fol. 218] Mr. Price:

Our position, if the Court please, is this boat was brought up here on Lake Texoma, which is in no sense navigable waters.

The Court:

That wasn't where your contract was originally bought.

Mr. Price:

They sent this contract down to the agent McKinney, who delivered it to Wilburns at Denison. Our position is that it is a Texas contract, governed by Texas law. Now, if the Court please, Article 5056 provides in part who are agents:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from any company, or who advertises or otherwise gives notice that he will receive or transmit same or who shall receive or deliver a policy of insurance of any such company or who shall examine or inspect any risk, or receive or collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, aid or adjust or aid in adjusting any loss for or in behalf of any such company. When any such action shall be done at the instance or request of any insurance company or broker, he shall be [fol. 219] held to be the agent for the company for which the act is done", and so forth.

Now, he gets this contract from the Cleaveland Agency and takes it over and makes delivery to the Wilburn Brothers in Denison, Texas. He collects from them by check drawn on a Denison Bank. More than one check. The premium covering that, and transmits it in. He goes out

and examines and inspects the risk and forwarded his survey, which survey reached the general agents in the company's office and was in their office prior to the loss and which survey showed that it was being planned to use it for commercial purposes. In answer to a question, "Purposes for which to be used: Commercial", and, second question, it shows it was to be chartered, and we say that they can't sit up there with written notice, revealed, that is placed in their own files and accept the premium and wait until a loss has occurred and say, oh, well, the policy says you were to use it only for pleasure. Now, then, Article 5054 provides that any contract of insurance payable to any citizen or inhabitant of this state by any insurance company or corporation doing business in this state shall be held to be a contract made and entered into and under and by virtue of this state relating to insurance and governed thereby, notwithstanding that any policy or contract of insurance may provide that the contract was executed and premiums on such policy shall be payable without the state to the home office of the company issuing the same.

The Court:

Yes, and all those laws go out the window if this is a contract, a maritime contract.

[fol. 220] Mr. Price:

If the Court please, the only connection this contract has with the Mississippi was that there had been a policy issued to the former owners in Mississippi. A new contract from the beginning was not written but there was no contract with the Wilburn Brothers until they took that contract in Illinois and put indorsements on there making a new agreement with the Wilburn Brothers which became effective upon delivery in Denison, Texas, to them.

The Court:

That is where your trouble is, they didn't make any new agreement and they didn't make any new subject matter of agreement. The only thing that was different from the original contract, as I apprehend the facts and record, is that it indicated different parties as insureds. That is the only difference or change in the contract. And it would not

avail you or any one else to say that the original contract of insurance was not a maritime contract, because it was essentially of that character when it was originally entered into, because at that time this was a completed ship and it was located on admittedly navigable waters of the United States. And the contract had wholly to do with navigation and commerce and it certainly was a maritime contract in its inception. Now, unless there has been some transition affected through this transportation from the Navigable waters to these inland waters, I don't see where the situation has changed, but go ahead with the argument, but the Texas law wouldn't prevail or any other local state law wouldn't prevail or have anything to do with it if this is a maritime contract within the contemplation of the Federal law, because [fol. 221] that is one matter over which the Federal authorities and Federal Courts have exclusive jurisdiction; that is, admiralty and maritime matters, and the state laws wouldn't prevail against them. But go ahead.

Mr. Price :

This contract as effectuated by the indorsement provides that it shall be placed on Lake Texoma, which is not navigable water, and there is nothing sound in the position that because it had once been in navigable water that after it had been removed from them, it would have to still be treated as though it were on navigable waters.

The Court :

Well, there is a whole lot of question in the case right there, but you claim this is a Texas contract, and it is subject to the rules of construction of those contracts in the light that our statutes relate to them. That is your position?

Mr. Price :

That is right, Your Honor. And here with those indorsements was a contract of this company to pay these Wilburn Brothers for damage to that boat, and you look at it in the light of the situation after it had been removed from the Mississippi River and placed on Lake Texoma and they entered into this agreement here in Denison, Texas. That is our position.

The Court :

And of course, you think you are entitled to the whole \$40,000 in the event you should recover.

[fol. 222] Mr. Price :

I believe that indorsement on the policy, at which time they agreed that would be the value, would govern in the absence of a plea on their part of fraud and collusion on the part of Wilburn Brothers and Mr. McKinney who sent in that survey. And there has been no such claim or charge made as that.

The Court :

Well, I don't think I can go that far with you, because I think the only thing they are entitled to recover in the event they should recover would be their actual loss in the value of this vessel. And I am very suspicious that doesn't approximate any \$40,000. But I think the best disposition of this— You have got some very unusual and novel provisions in this situation and a very unusual situation to say the least, and if you gentlemen don't mind, I think I am going to invite written briefs on this and determine the matter in the light of those. Now, is there any objection to that course?

Mr. Hayes :

On the contrary, Your Honor, I think that it has been mentioned by the Courts that that method of submission of all maritime questions is preferred rather than decision—

The Court :

Well, I think that would be much more desirable. One reason I am inclined to think it is that while my knowledge of admiralty law is not profound, I have had some experience with it and I notice these gentlemen are not prepared on that, and I think they should have an opportunity to reply to your position about that, although these general positions [fol. 223] you announce are generally unassailable if they fit the facts in this situation, and I am very suspicious that they do fit the facts, unless this contract was changed from one of a maritime nature to simply a local contract through the change in position of the location of this boat incident

to its removal from admittedly navigable waters and its dedication to a purpose that might be questionable from a maritime standpoint, although it may still remain a maritime contract. I am not certain about that at all. I would rather—

Mr. Hayes:

Your Honor, if I may judge you for a moment by myself, your interest aroused in this question, you will probably be looking at cases while the briefs are coming in. I have not referred to many cases. May I refer to the early case of *Gibbons vs. Ogden*?

The Court:

I believe I have heard tell of that case.

Mr. Hayes:

In which it was held—its significance in this case doesn't regularly appear. It is a case of 300 pages. The gist and meaning of that decision is in the statement of Mr. Justice Martin that navigation and commerce are equated where you have interstate commerce on water. You have navigation where you have interstate commerce by that means.

The Court:

I got your position fully and this is essentially interstate movement on that situation between Oklahoma and Texas. [fol. 224] I understand that. I have heard of *Gibbons vs. Ogden* from my school days on down and I have got every case you have cited here before me, a memorandum of it. I will give you gentlemen a full opportunity to submit this on briefs because there is nothing that an Appellate Court can or will do about it until November and if I pass judgment today I wouldn't have too much confidence in it, because I am uncertain in my own mind about it. But if your position about this being a maritime contract is true, then I think the conclusions that follow from your argument are almost irrefutable and unassailable. But how much time do you gentlemen want within which to prepare your briefs?

Mr. Hayes:

30 days or do we have the burden of the motion? It is our motion to dismiss.

The Court:

You will have the burden, yes. I want you to submit your brief and let them have an opportunity to reply to it. You needn't be urgent about the time, because I probably wouldn't be able to give much consideration to it for a couple of months if I keep up my expected Court room duties for the next two or three months, but I will give you a decision in plenty of time. Whoever is aggrieved by it can appeal to the Circuit Court of Appeals at Fort Worth in November.

Mr. Hayes:

Would it save time if there should be briefs submitted contemporaneously by both sides and each side have a right to reply to the other?

[fol. 225] The Court:

No, you file your brief first. I will give you 45 days in which to file it and then 30 days to reply and then you some time to reply.

Mr. Hayes:

Me some time to reply?

The Court:

Yes sir. You submit your brief in 30 days and I will probably give them 30 days to reply and I will probably give you 10 or 15 days in which to reply to that, and it will be ready for decision in the early part of May or June.

Mr. Hayes:

I suppose if either of us should get short on time, that we can agree on that.

The Court:

I will accommodate you, but I want it decided so there will be no undue delay about the final determination of it on

appeal, if whoever is aggrieved decides to appeal. Is that all, gentlemen?

Mr. Alexander Gullett:

Thank you, Your Honor.

Pages Nos. 137-184 of the Transcript of Trial Proceedings are omitted because they contain typed or photostatic copies of exhibits, the originals of which are transmitted to the Clerk of the United States Court of Appeals under order of Court dated January 11, 1952.

Ruth B. Head, Clerk, U. S. District Court, by Catherine W. Gray, Deputy Clerk.

[fol. 226] PLAINTIFF'S EXHIBIT No. 1

Indorsement made and agreed to this 6th day of August, 1948.

Assured Robert D. Marshall & John Shuler. Location

Copy of Indorsement

Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read:

Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company.

Otherwise this Policy remains unchanged.

Attached to and forming part of Policy No. YA28579 of the Firemen's Fund Insurance Co.

— — — — —, Agent. H. H. Cleaveland, Agency.

Pencil notation: D-2A, SS 10-18-49.

Western Marine Department
A-838—175 W. Jackson Boulevard
Chicago, Ill.

August 16, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Firemen's Fund Insurance Company [fol. 227] issued to Robert D. Marshall and John Shuler.

Effective August 6, 1948, it is hereby understood and agreed that the name in this policy is amended to read:

Glen, Frank and Henry Wilburn d b a Wilburns Boat Company.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. H. Rossow.

Pencil notation: D-2-B, SS 10-18-47.

Western Marine Department
A-838 175 W. Jackson Boulevard
Chicago, Ill.

October 4, 1948 19

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of the fact that the Assured has installed a Diesel Marine Engine = which replaces the gasoline engine in the vessel insured hereunder, there is due and payable, effective October 4, 1948 a r-turn premium of \$15.95.

Otherwise this policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

[fol. 228] Pencil notation: D-2-C, SS 10-18-49.

F. B. White.

Established 1868
H. H. Cleaveland Agency
Insurance
Telephone R. 1. 280
3rd Ave. at Eighteenth Street
Rock Island, Ill.

October 27, 1948.

Wilburn Brothers,
Denison, Texas

Re: Fireman's Fund Insurance Co. Policy YA 28579

GENTLEMEN:

Enclosed herewith please find copy of indorsement to attach to the above policy including coverage on a new

Diesel Marine Engine which replaces a gasoline engine. A refund of \$15.95 is allowed.

If you have the serial number of the Diesel Engine, would you please advise us for completion of our files?

Thanking you, we are

Yours very truly, H. H. Cleaveland Agency, (S.)
E. M. Joens, (T.) (E. M. Joens).

emj.

encl.

[fol. 229] Pencil notation: D-2-D, SS 10-18-49.

Western Marine Department
A-838—175 W. Jackson Boulevard
Chicago, Ill.

October 4, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of the fact that the Assured has installed a Diesel Marine Engine \neq 22441 which replaces the gasoline engine in the vessel insured hereunder, there is due and payable, effective October 4, 1948 a return premium of \$15.95.

Otherwise this Policy remains unchanged.

(S.) Wilburn Bros., by J. F. Wilburn, Sec.

Pencil notation: D-2-E, SS 10-18-48.

Western Marine Department
A-838—175 W. Jackson Boulevard
Chicago, Ill.

December 20th, 1948.

Indorsement: Attached to and forming part of Policy No. YA 28579 of the Fireman's Fund Insurance Company issued to Wilburn Brothers.

In consideration of an additional premium of \$234.01 it is understood and agreed that the amount of insurance [fol. 230] hereunder is increased to \$40,000.00. It is further

understood and agreed that the said vessel, for so much as concerns the Assured by agreement between the assured and Assurer in this policy is, and shall be valued at \$40,000.00.

It is further understood and agreed that the lay-up and cancellation clauses are amended as follows:

To return \$.25c% per cent net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period such period the vessel being at the risk of the underwriters.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return \$7.52c% per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return nil per cent, net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival.

Otherwise this policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

Pencil notation: D-2-F, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

July 2, 1948.

Indorsement: Attached to and forming part of Policy No. YA-28579 of the Fireman's Fund Insurance Company, [fol. 231] issued to Robert D. Marshall and John Shuler as their respective interests may appear.

Effective June 9, 1948, it is understood and agreed that the name and address of the Assured hereunder is amended to read: Frank and Henry Wilburn d/b/a Wilburn Bros., Denison, Texas.

In consideration of an additional premium of \$166.43 it is understood and agreed that the coverage hereunder is extended to cover full marine perils in accordance with the basic policy. It is further understood and agreed that all paragraphs under the heading "Conditions" are reinstated and made part of this policy.

It is further understood and agreed that the layup and cancellation clauses in the policy are amended to read:

"To return Nil per cent, net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing. To return 11.51c per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return Nil per cent, net for every fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival."

Warranted by the Insured that the vessel be confined to Lake Texhoma.

[fol. 232] In consideration of the premium charged, the navigation limits in the policy are extended to cover a cruise from Greenville, Mississippi via Mississippi and Red Rivers to Denison, Texas and thence locked through to Texoma Lake.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.
dp.

Pencil notation: D-2-G, SS 10-18-49.

Fireman's Fund Insurance Company

No. 64966

San Francisco, California

Western Marine Dept.,

Insurance Exchange Bldg.

Chicago 4, Illinois

Renewal Premium \$150.00 P & I 116.25.

Policy No. YA-28579.

Amount of insurance \$10,000.00 P & I 25,000/50,000 PD
25,000.00.

Renewal Certificate

In consideration of the renewal premium above stated, the said policy issued to Robert D. Marshall and John Shuler as their respective interests may appear, (Number

and name of street) 1337-21st Avenue, (City) Rock Island, (State) Illinois, is renewed for the period from May 22, 1948 to May 22, 1949, subject to the terms and conditions thereof:

Jno. F. Crafts, President.

W. Stanley Pearce, Secretary.

[fol. 233] Countersigned at Rock Island, Ill. this 28th day of April, 1948.

H. H. Cleaveland Agency. (S.) by R. M. Thorpe,
Agent.

dp.

Pencil notation: D-2-H, SS 10-18-49.

Western Marine Department

A-838—175 W. Jackson Boulevard

Chicago, Ill.

August 5, 1947.

Indorsement: Attached to and forming part of Policy No. YA 26896 of the Fireman's Fund Insurance Company issued to Robert D. Marshall and John Shuler, et al.

In consideration of a return premium of \$18.76, it warranted by the assured that the vessel insured hereunder was laid up and out of commission from September 14, 1946 to May 22, 1947.

Otherwise this Policy remains unchanged.

H. H. Cleaveland, Agency. (S.) by E. M. Joens.

Pencil notation: D-2-1, SS 10-18-49.

Yacht Policy

Policy No. YA 28579

Fireman's Fund Insurance Company

San Francisco, California

Western Marine Department

Insurance Exchange Building

175 West Jackson Boulevard

Chicago 4, Ill.

[fol. 234] Amount \$10,000.00 P & I 25,000/50,000 P D 25,000.0.

Rate $1\frac{1}{2}\%$.

Premium \$15.00 P & I 116.25.

In Consideration of the stipulations named herein and of One Hundred Fifty and no/100 Dollars Premium, Does Insure Robert D. Marshall and John Shuler as their respective interests may appear, hereinafter called the Assured, Whose address is 1337-21st Avenue, Rock Island, Illinois For the sum of Ten Thousand and no/100 Dollars From the 22nd day of May 1947 to the 22nd day of May 1948, Beginning and ending at noon, Standard Time at place of issuance of this policy.

(First of this sentence is marked through with red ink) upon the Hull, Spars, Sails, Materials, Fittings, Boats, including Launches of every description, Furniture, Provisions, Stores, Refrigerating and Electric Light Plants and Installation and all Machinery, Boilers, etc. of and in the good 1931 64' Gasoline Houseboat Yacht called the "Wanderer" or by whatsoever other name or names the said vessel is or shall be named or called, beginning the adventure upon the said vessel as above, and shall so continue and endure during the period as aforesaid. Should the above vessel, on the expiration of this Policy, be at sea, or in distress, or at port of refuge or of call, it is agreed to hold her covered until arrival at port of destination on her being moored therein twenty-four hours in good safety (provided that before the expiration of this Policy the Insured shall have given notice in writing of intention to so

[fol. 235] continue) at a Pro Rata monthly premium and it shall be lawful for the said vessel, etc. to proceed and sail to and touch and stay at any port or places whatsoever and wheresoever without prejudice to this insurance. The said vessel, for so much as concerns the Assured by agreement between the Assured and Assurers in this Policy, is and shall be valued at Ten Thousand and no/100 Dollars.

Warranted by the Insured that the vessel be confined to Yacht Harbor, Greenville, Mississippi during the currency of this Policy.

Warranted by the Insured that the within named Vessel shall be laid up on shore and out of commission from ——— to ———.

This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made part of this Policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached.

Provision required by law to be stated in this Policy.— This Policy is issued by a Stock Corporation.

[fol. 236] In Witness Whereof, the undersigned on behalf of the said Company have hereunto subscribed their names in the City of San Francisco.

Jno. F. Crafts, President.

W. Stanley Pearce, Secretary.

Not valid unless countersigned by a duly authorized Agent of the Company.

Countersigned at Rock Island, Illinois this 22nd day of May, 1947.

H. H. Cleaveland Agency. (S.) by E. M. Joens.

Typewritten note on margin of policy:

Warranted boat carries at least four approved fire extinguishers kept filled and in good working order.

Pencil notation: D-2-J, SS 10-18-48.

Conditions

Warranted by the Assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this Policy and shall not be hired or chartered unless permission is granted by indorsement hereon.

Touching the adventures and perils which we, the Assurers, are contented to bear, and do take upon us, they are of the seas, men-of-war, fire, explosion, enemies, pirates, rovers, assailing thieves, jettisons, letters of mart and [fol. 237] countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or qualify soever, barratry of the Master and Mariners, and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of said vessel or any part thereof. And in case of any loss or misfortune, it shall be lawful for the Assured, their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the said vessel or any part thereof, without prejudice to this insurance; to the charges whereof the said Assurers, will contribute according to the rate and quantity of the sum herein insured. And it is especially declared and agreed that no acts of the Assured or Assurers in recovering, saving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment.

With Leave to Sail with or without pilots, to tow and to be towed, and to assist vessels and/or craft in ail situations and to any extent, to render salvage services, and to go on trial trips. With leave to dock, undock, and change docks as often as may be required, and to go on slipway, gridiron and/or pontoon, and to adjust compasses.

Warranted Free from loss of or damage to spars and/or sails while racing.

Notwithstanding Anything To The Contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from [fol. 238] capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time or peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike

operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

Warranted Free of loss or damage caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

This Insurance Also, to Cover subject to the special terms of this Policy, loss of and/or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager.

No Recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value.

Not Liable for wages and/or provisions whether the average be particular or general.

It Is Also Agreed, that should any part of the furniture, tackle, boats or other property of the said vessel be separated and laid up on shore during the life of this Policy then this Policy shall cover the same against the risk of fire only [fol. 239] to an amount not exceeding its proportion of twenty per cent (20%) of the amount attaching on hull. The amount attaching on the said vessel shall be decreased by the amount so covered.

In Case of Claim, repairs to be paid without deduction of "New for Old" whether the average be particular or general.

And it is further agreed that if the vessel hereby insured shall come into collision with any other ship or vessel, and the Assured shall, in consequence thereof, become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the vessel hereby insured, we, the Assurers, will pay the Assured such portion of such sum or sums so paid as our subscriptions hereto bear to the value of the vessel hereby insured. And in cases where the liability of the vessel has been contested, with the consent, in writing, of a majority of the underwriters on the hull, and so

forth, (in amount), we will also pay a like proportion of the cost hereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under the collision clause shall be settled on the principal of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision; and it is further agreed, that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners, all questions of responsibility and amount of liability as between the two vessels being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of underwriters interested in each vessel. The two arbitrators chosen to choose a third arbitrator before entering upon the reference, and the decision of such single, or of any two of such three arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

Any Agreement, contract, or act, past or future, positive or implied, by the Assured whereby any right of recovery by the Assured against any vessel, person or corporation is released, decreased, transferred, or lost, which would, on acceptance of abandonment or payment of loss by this Company, belong to this Company but for such agreement, contract or act, shall render this Policy null and void as to any such loss, but the Company's right to retain or recover the full premiums shall not be affected.

[fol. 241] It Is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers.

This Entire Policy Shall Be Void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss.

Warranted By The Assured to report immediately to the nearest office of this Company or to the Agent who shall have issued this Policy every loss or damage which may become a claim under this Policy, and shall also file with the Company, a detailed sworn proof of loss within ninety (90) days from date of loss.

Losses shall be payable in thirty (30) days after proof of loss or damage covered by this Policy, and of the amount thereof, and of the interest of the Assured, shall have been made and presented at the Office of this Company (the amount of premium on this Policy, if unpaid, and all other indebtedness due this Company being first deducted).

No Suit Or Action on this Policy for the recovery of any claim hereunder shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all the foregoing requirements, nor unless commenced within twelve (12) months next after the happening of the loss; provided that where such limitation of time [fol. 242] is prohibited by the Laws of the State wherein this Policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

To Return . . . per cent, net for every fifteen (15) consecutive days the vessel may be laid up and out of commission during working period during such period the vessel being at the risk of the underwriters.

Either Party may cancel this Policy by giving fifteen (15) days' notice in writing. To return per cent, net for every fifteen (15) consecutive days of unexpired time of working period and to return per cent, net for every

fifteen (15) consecutive days of unexpired time of lay-up period, if this Policy be canceled and arrival.

Port Insurance.

On Account of Robert D. Marshall & John Shuler as their interest may appear, Loss, if any, payable in funds current in the United States to Assured or order do make insurance and cause to be insured at and from the 22nd day of May 1947 until the 22nd day of May 1948 beginning and ending with noon Standard Time for Ten Thousand and no/100 Dollars (\$10,000.00) upon the 1931 64' Gasoline House Boat called the "Wanderer" (or by whatsoever other name or names the said vessel is or shall be named or called) her hull, spars, sails, materials, fittings, boats (including launches, steam or otherwise, if [fol. 243] any), furniture, provisions, stores electric light installation and plant, if any, machinery, boilers, etc. valued at \$10,000.00.

Touching the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Sea, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what nation, condition or quality soever. Barratry of the Master and Mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said ship &c., or any part thereof. And in case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defense, safeguard and recovery of the said ship &c., or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the Rate and Quantity of the sum herein Assured. And it is expressly declared and agreed that no acts of the insurer or the insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or their assigns One Hundred Fifty and no/100 Dollars, being at the rate of one per cent.

Warranted by the Assured that the within named yacht shall be laid up and out of commission, during the currency of this policy at Yacht Harbor at Greenville, Mississippi with leave to dock, undock and change docks as may [fol. 244] be required, and to go on Slipway, Gridiron and/or Pontoon, also to strip, refit and/or fit out and/or to adjust compasses, to load and/or discharge cargo and to move (in tow and/or otherwise) as required within the limits mentioned herein.

This insurance also specially to cover loss of and/or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion howsoever and wheresoever occurring, bursting of boilers, breakage of shafts, or through any Latent Defect in the Machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the Vessel, or any of them, or by the manager.

To pay average without reference to percentage.

In case of any claim for average the repairs to be paid Without Deduction of One-third, whether the average be particular or general.

General average and Salvage charges as per foreign custom, payable as per foreign statement, and/or per York-Antwerp rules, if required; and in the event of Salvage, towage, or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the Vessels) shall be ascertained by Arbitration in the manner hereinafter provided for under the "Collision Clause," and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

[fol. 245] Warranted free from Capture, Seizure and Detention, and the consequences of any attempt thereat, and all other consequences of hostilities (Piracy and Bar-ratry excepted).

No recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value.

Held covered in the event of any breach of warranty,

or deviation from the conditions of this policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Either party may cancel this Policy by giving fifteen (15) days' notice in writing.

To Return pro rata per cent, net for every days of unexpired time, if this insurance be canceled, and arrival.

It is also agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred, pledged without the previous consent in writing of the Assurers.

Collision Clause.

And it is further agreed that if the Ship hereby insured shall come into collision with any other Ship or Vessel and the assured and/or charterers shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby insured, we, the assurers, will pay the assured [fol. 246] and/or charterers such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the Ship hereby insured. And in cases where the liability of the Ship has been contested with the consent, in writing, of a majority of the underwriters on the hull and/or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners and/or charterers of one or both of such Vessels becomes limited by law, claims under the collision clause shall be settled on the principle of Cross Liabilities as if the Owners and/or Charterers of each Vessel had been compelled to pay to the owners and/or charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured and/or charterers in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same owners and/or charterers, all questions of responsibility and

amount of liability as between the two Ships being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement to the decision of Arbitrators, one to be appointed by the managing owners and/or charterers of both Vessels, and one to be appointed by the majority in amount of Underwriters interested in each Vessel; the two Arbitrators chosen to choose an Umpire before entering upon the reference. The decision, as the case may be, of the single Arbitrator, or of [fol. 247] two Arbitrators, or of the Umpire appointed as above to be final and binding.

Provided always that this clause shall in no case extend to any sum which the Assured and/or Charterers may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

The terms and conditions of this form are to be regarded as substituted for those of Policy (No.) to which it is attached; the latter being hereby waived.

New York, May 22, 1947.

Port Insurance.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

On Margin: This insurance also covers Fittings &c., (not exceeding 20% of the insured value) separated from the vessel and stored ashore against the risk of fire only.

Notation in Pencil: D-2-L 10-18-49.

[fol. 248] Western Marine Department.

A-838—175 W. Jackson Boulevard.

Chicago, Ill.

May 22nd, 1947

Indorsement: Attached to and forming part of Policy No. YA 28579 issued to Robert D. Marshall and John Shuler As their interests may appear.

Subject to the terms and conditions of this policy, it is agreed that the insolvency or bankruptcy of the in-

sured under this policy shall not release this company from payment of any loss or damage covered under this policy which is occasioned during the term of this policy; and in case, because of such bankruptcy or insolvency, an execution against the insured under this policy is returned unsatisfied in any action against said insured to recover for any loss or damage covered under this policy, then an action may be maintained by the person or persons recovering such judgment or his or her personal representative against this company under the terms of this policy and subject to all the conditions of this policy for the amount of the judgment in such action; but not exceeding, in any event, the amount of this policy.

Otherwise this Policy remains unchanged.

H. H. Cleaveland Agency, by (S.) E. M. Joens.

Pencil notation: D-2-M, SS 10-18-49.

Form C Revised 3-1-34 (4-1-47).

[fol. 249]

Dated May 22, 1947.

In consideration of an additional premium of \$116.25 being at the rate of—this indorsement is attached to and made part of Policy No. YA 28579 Fireman's Fund Insurance Company, issued to Robert D. Marshall and John Shuler as their interests may appear.

Protection and Indemnity Clause

And we further agree that if the Assured shall by reason of his interest in the insured ship (or boat) become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and or expenses or shall become liable for any other loss arising from or occasioned by any of the following matters or things during the currency of this Policy in respect of the ship (or boat) hereby insured, that is to say:—

Property Damage:

(1) Loss of or damage to any other ship or boat or goods, merchandise, freight or other things or interests whatsoever, on board such other ship or boat, caused proximately or otherwise by the ship (or boat) insured in so far as the

same is not covered by the running down clause of the Hull policy:

Loss of or damage to any goods, merchandise, freight or other things or interests whatsoever other than as aforesaid, whether on board said ship (or boat) or not, which may arise from any cause whatever:

[fol. 250] Loss or damage to any harbor, dock, (graving or otherwise), slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever, or to any goods or property in or on the same, howsoever caused:

Any attempted or actual raising, removal or destruction of the wreck of the insured ship or the cargo thereof, or any neglect or failure to raise, remove or destroy the same:

we will pay the Assured such proportion of such sum or sums so paid, or which may be required to indemnify the Assured for such loss, as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured; provided always that the amount recoverable hereunder in respect to any one accident or series of accidents arising out of the same event shall not exceed \$25,000.00.

Personal Injury:

(11) Loss of life or personal injury and payments made on account of life salvage, we will pay the Assured such proportion of such sums so paid or which may be required to indemnify the Assured for such loss as the sum insured under this Policy on Hull bears to the Policy value of the ship (or boat) hereby insured, provided always that the liability of this Company for claims on account of loss of life and or personal injury and or on account of life salvage is limited to its proportional part of \$25,000.00 in respect to any one person and, subject to the same limit for each person, to its proportional part of \$50,000.00 in respect to any one accident or series of accidents arising out of the same event.

[fol. 251] Costs:

(III) And in case the liability of the Assured shall be contested in any suit or action, we will also pay our proportion of such ensuing costs as the Assured may incur with the consent in writing of two-thirds in amount of the underwriters.

Notwithstanding the foregoing, this Clause is warranted free from any claim arising directly or indirectly under the Federal "Longshoremen's and Harbor Workers' Compensation Act."

Should this policy be canceled in accordance with its terms by the Assured or by this Company, return premium under this clause shall be computed as follows:

Where the Hull policy to which this indorsement is attached provides for six (6) months navigation or less, and the premium has been paid, this Company shall return 6% net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the working period and 1% net of the annual premium for every fifteen (15) consecutive days of the unexpired time of the layup period.

Minimum premium to be retained \$10.00.

Where the Hull policy to which this indorsement is attached provides for more than six (6) months navigation, and the premium has been paid, this Company shall return 3% net of the annual premium for every fifteen (15) consecutive days of the unexpired time. Minimum premium to be retained \$10.00.

[fol. 252] Pencil notation: D-2-X, SS 10-18-49.

Fireman's Fund Insurance Company
San Francisco, California

Atlantic Marine Department

116 John Street

New York 7, N. Y.

(1) In consideration of a premium of nil Dollars (\$—), being at the rate of—this Company agrees to insure for the term of one year from May 22, 1947 to May 22, 1948 the

liability of Robert D. Marshall and John Shuler as their interests may appear in respect of the 1931 64' Gasoline Houseboat yacht "Wanderer" which shall arise under the Longshoremen's and Harbor Worker's Compensation Act, being Public Act No. 803 of the 69th Congress, approved March 4th, 1927, and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

(2) The Company expressly reserves the right to cancel this Policy if the premium is not paid by the Assured within sixty days after the attachment of this Policy by the mailing of notices of such cancellation to the parties enumerated in paragraph five (5) of this Policy and subject to the conditions of said paragraph.

(3) The Company will carry out the provisions of section 35 of said Act. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

[fol. 253] (4) The Company agrees to abide by all the provisions of said Act and all lawful rules, regulations, orders, and decisions of the Federal Security Agency, Bureau of Employee's Compensation and Bureau having jurisdiction, unless and until set aside, modified, or reversed by a Court having jurisdiction of the parties and the subject matter.

(5) This Policy shall not be canceled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer. If this Policy be canceled at the option of this Company pro rata rates will be charged, if at the request of the assured short rates will be charged. From all return premiums the same percentage of deduction (if any) shall be made as was allowed by this Company on receipt of original premium.

(6) It is understood and agreed that this insurance fully covers the liability of the assured insuring under said Act but in no case does this insurance extend beyond the provisions of said Act.

(7) It is agreed that upon payment of any loss, or damage, or expense the Company is to be subrogated to all the rights of the assured to the extent of such payment.

(8) This Policy is not assignable.

Provision Required by Law to be Stated in this Policy.—
This Policy is issued by a Stock Corporation.

[fol. 254] In Witness Whereof, the undersigned on behalf of the said Company have bereunto subscribed their names in the City of San Francisco.

Jno. F. Crafts, President. W. Stanley Pearce, Secretary.

Not valid unless countersigned by a duly authorized Agent of the Company.

Countersigned at Rock Island, Illinois this 22nd day of May, 1947.

H. H. Cleaveland Agency, By (S.) E. M. Joens, Agent.

Pencil notation: D-2-0, SS—10-18-49.

Policy Indorsed on back as follows:

Yacht Policy No. YA 28579 Fireman's Fund Insurance Company, San Francisco, California, Western Marine Department, Insurance Exchange Building, 175 West Jackson Boulevard, Chicago 4, Ill.

Assured: Robert D. Marshall and John Shuler as their interests may appear.

Amount: \$10,000.00—Hull 25,000/50,000—P & I.

Premium: 150.0—Hull 116.25—P & I.

Expires May 22, 1948.

[fol. 255]

PLAINTIFFS' EXHIBIT 2

Home Fire and Marine Insurance Company

Western Department

175 W. Jackson Boulevard

Chicago—4

May 12, 1949.

E. D. Lawson

Vice-President and Manager

Messrs. Glenn, Franklin and Henry Wilburn

DBA Wilburn Boat Company

Denison, Texas.

GENTLEMEN :

We are now in receipt of two copies of a purported "Sworn Statement in Proof of Loss," apparently signed by you. Apparently the statement attempts to assert a claim against us under our policy YA-28579. It does not do so.

We are returning this statement to you herewith for a number of reasons, some of which are stated below—without waiver however, of any right or defense of this company under its policy contract or otherwise, whether herein expressed or not, all rights and defenses of this company being hereby expressly reserved.

In the statements mentioned on the first page you included the words "Agency at Denison, Texas (R. L. McKinney)," and also the words "to R. L. McKinney Agency, 307 West Woodward Street, Denison, Texas." Apparently you intend these as indications of a person to whom the statement was addressed. Of course the R. L. McKinney Agency is [fol. 256] not an agent of this company and never was. The R. L. McKinney Agency was your broker in connection with a number of transactions touching the policy referred to and was the person to whom you applied to make arrangements for you in connection with the insurance mentioned.

Further we direct your attention to the stipulation of the policy referred to which reads as follows:

"It is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, as-

signed, transferred or pledged without the previous consent in writing of the assurers."

Your statement herewith returned says that the "yacht" Wanderer mentioned in the policy referred to was sold by you to a corporation. The consent of this company was not given (nor even asked) in writing or otherwise to that sale or to any sale, assignment, transfer or pledge of this yacht. Your statement goes on to say repeatedly that you were the owners of all stock of the corporation to which you sold the yacht and we suppose you mean to suggest that this sale therefore was not a sale, which of course is not correct, but beyond that is the further fact which, like the fact of the sale, has come to our attention since the alleged loss of the yacht, namely, the fact that the corporation in which you say you own all the stock transferred the yacht to a bank as security for a loan of \$10,000 (a loan which, by the way, seems not to have been paid when it fell due). Again our consent was neither given nor asked to this or any other assignment, transfer or pledge of the yacht. It is apparent that you have violated the stipulation of the policy above quoted and have thereby rendered the insurance void.

[fol. 257] Further, it was represented to us by you through your broker, R. L. McKinney Agency, at the time when the increase in the amount of this insurance to \$40,000 was requested, that you had an investment of \$40,000 in the yacht, and insurance for \$40,000 was asked for on that basis and allowed on that representation. If the purchase price paid by you for the yacht plus repairs and betterments thereto amounted to an expenditure by you of \$40,000, then the amount of insurance requested would have been justified, but since the occurrence of the fire referred to in your statement information has come to us which if true would seem to show that you had no such investment in the yacht. You owed us a duty of frank, affirmative disclosure, and you did not perform it.

Moreover, since the fire mentioned, we have been informed that the corporation to which you sold this yacht was organized for the express purpose of operating it for commercial purposes, and that it was so organized at almost the same time that any of you became the assureds on the policy mentioned. That policy provided, under the con-

d-tions reiterated in the same indorsement by which any of you became assured thereon, as follows:

“Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by indorsement hereon.”

The policy likewise provided:

“This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance [fol. 258] concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss.”

Besides this express provision, it is a universal rule in connection with marine insurance policies that the assured is required to disclose to the insurer all facts material to the risk or the premium.

In these connections, it would now appear that this yacht was not acquired or used for private pleasure purposes by you, and that you acquired it for purely commercial purposes. None of this was disclosed to this company. Instead of being solely for private pleasure purposes, as the policy stipulated, it now develops that this yacht represented a commercial venture on your part—a commercial venture that was speculative at best (our information is that it had every prospect of failure). It is one thing to insure three men who can put \$40,000 into a yacht for private pleasure, and entirely different thing to insure a corporation with respect to a vessel it wanted only for a commercial purpose and which it mortgaged to raise funds.

We could continue, for it seems that there are other violations of the policy by you, and other defenses of this company. Indeed, it seems likely that there has been another sale or sales of the vessel. But no right or defense whatever of this company under this policy or otherwise, whether of like or different kind to those above referred to, is waived by failure to express it herein, or failure to express it fully, or by any expressions hereof, or by any means whatever, all rights and defenses being expressly reserved.

[fol. 259] Suffice it for the present to say that you asked for \$40,000 insurance on a yacht to be used solely for private pleasure purposes, stating you had an investment therein of that amount, which yacht was not to be sold, assigned, transferred or pledged without our written consent. The claim you present is for loss of the yacht belonging to a corporation, pledged to a bank for a loan to the corporation, and acquired for commercial purposes. It will be apparent to you that the policy does not cover that kind of a risk. We insured you three men on a yacht owned by you, free of mortgage debt, to be used solely for private pleasure purposes, in which you gave us to understand you had put \$40,000. We did not insure any corporation on any vessel, encumbered or to be encumbered for debt without our consent, or used or to be used as a commercial venture, nor did we insure for \$40,000 any commercial vessel in which that sum had not been invested by you.

We refer you to the terms and provisions of the policy; the claim made by you does not fulfill them.

Among other things your "Statement in proof of loss" is insufficient and in that connection also we refer you to the policy.

We reserve all objections to your recovering in any form. We waive none of the rights of this company. We leave you to pursue such a course as you may deem expedient. On the trial of any action you may institute against this company you must come prepared to prove everything, which according to the terms and conditions of the policy, or otherwise, it may be necessary for you to prove in order to recover, and expecting to be met with every defense which this [fol. 260] company has, or may hereafter acquire; and we feel very strongly that upon the real facts you cannot prove what is necessary for you to recover, and that defenses of this company are good.

We return to you herewith the premium you paid, on the express understanding that your acceptance thereof recognizes that this policy is void and that there is no claim thereunder.

Very truly yours, Firemen's Fund Insurance Company, by (Signature unintelligible).

PLAINTIFFS' EXHIBIT 3

Application & Survey for Yacht Policy

(In pencil: "See letter from Agent February 9, 1949.

- [x] Fireman's Fund Insurance Company.
☐ Home Fire and Marine Insurance Company.
☐ Western National Insurance Company.

Western Marine Department

Insurance Exchange Building

175 West Jackson Boulevard, Chicago, Ill.

Owner: Wilburn Brothers. Address: Denison, Texas.
 for: \$40,000. upon: river type diesel Yacht called:
 Wanderer.

Attaching from December 20, 1948 to May 30, 1949.

Warranted laid up and out of commission from
 to

[fol. 261] The following information is necessary.

Occupation of owner Meat Packers. Business address
 120 N. Austin, Denison, Texas.

Particulars of any losses sustained by Applicant during
 past 5 years: August 1948—\$341.35 paid.

Cost of vessel to present owner: \$30,000 plus \$10,000 for
 engine, lighting & fire fighting equip.

Date and from whom purchased: Schuler and Marshall.

Estimated marked value \$40,000. Estimated replacement
 cost unknown.

Particulars of any mortgage or other encumbrance None.

When built 1931. Where build Rock Island, Ill. By whom
 built Unknown.

Length 65.0' B.P. Beam 17.0'. Draft 30".

Has vessel round, vee or skiff type bottom: skiff type.

State whether cabin, awning roof or open boat cabin.

Has vessel ever been repaired or rebuilt? If so, give par-
 ticulars and amount expended: yes.

What waters are to be navigated: Lake Texoma, North
 of Denison, Texas.

[fol. 262] For what purpose is vessel to be used: Commercial.

Is boat ever let, chartered, or used for carrying passengers for hire? Chartered.

Summer location of vessel: Burns Run Resort, Lake Texoma.

Winter location of vessel: Lake Texoma Boat & Dock Co.

Where and when may vessel be inspected? Burns Run Resort.

Number and kind of fire extinguishers: See attached.

Describe any cooking appliances on board: 3 Electric Hot-point appliances.

Location of stove Location of fuel tank for stove

Is woodwork around and overhead of stove protected by metal sheeting: Yes.

How many Engines: one. Make of Engine(s): GMC w/Gray Marine Cooler.

Age of Engine(s): New.

No. of Cylinders 6 h. p. 225. Maximum Speed 10 m. p. h. Price paid if purchased separately \$5,000.

[fol. 263] Is Engine in enclosed compartment? If so, state how ventilated: Yes—windarm air scoops under bilge.

No. of tanks: one. Material of tanks: steel. Where located: Forward. Engine: Gallons capacity: 250.

In spilling gasoline when filling does it drain to bilge or overboard? Overboard (Diesel Oil).

Does propeller extend below line of keel: wheel—no.

Is there a guard under it——

Number of anchors 3. Weight 125—bow. Length and size of chain and/or rope 150" wire rope $\frac{3}{8}$ " 150 manila $1\frac{1}{2}$ ".

The above statement, made and signed by the owner or owners for insurance warrants the informations set forth as correct.

This is submitted to establish the actual character and condition of the vessel, and is to be used as the basis on which the insurance is granted.

This insurance is subject to the terms and conditions of the Policy used by the Assurers at this date.

Dated — —, 19—, at ———.

Signature of owner:

(S.) J. F. Wilburn.

Address: ———.

(See other side.)

[fol. 264] When surveyor is employed, the following additional information is necessary. If no surveyor is employed, the Applicant is requested to complete as much as possible.

Construction and General Arrangement; Material of hull, frames, size and spacing, fastening. Short description of exterior and interior lay-out with notation of kind of wood and finish:

Large cabin—17 x 35—hardwood floor.

Toilets—men—starboard aft of main cabin.

Toilets—ladies—port aft of main cabin.

Engine Room—rear of toilets 17 x 10.

Equipment:

Is vessel equipped according to her class? Yes.

Describe—sails ——— Boats: 1 boat 16 ft. 4 floats—25 passengers.

Spare Propeller ——— Lights ———.

Engine, Etc.

Describe engine location and state whether under deck or enclosed in casing: Main deck aft.

Has carburetor backfire trap? Yes. Drip pans? Yes.

Describe location of batteries. Enclosed in lead line case below engine room.

[fol. 265] Describe condition of electric wiring. All in rigid cable.

Are bilges free from gasoline and oil? Yes.

Has engine self-starter? Yes.

Further details of engineroom ventilation: Windows 2 x 4 outlets.

Further details of fuel tank ventilation: vented to outside and above deck.

Particulars of an auxiliary engine and its fuel tank: No auxiliary engine.

General Condition and Upkeep:

Excellent.

Details of crew and experience of person usually in charge: The pilots have had from one to two years experience on large boats and several years experience on small boats. James F. Wilburn and Alton J. Wilburn, the pilots have commercial operators licenses which were issued permanently Oct. & Nov. respectively last year after they had had temporary licenses.

Remarks of Surveyor:

W. E. Blackshear the engineer has had several years experience with marine motors. There are 2 large Co2 cylinders which have connections in the bilge and fuel tank compartment. There are 4 water tight bulkheads evenly [fol. 266] spaced across the entire length of the boat with a bulkhead in the bow. R. L. McKinney, Jr., Agent in Denison made the survey on the boat and can give you any desired information. We have attached a survey made by L. M. Fellows of New Orleans on January 19, 1948, which will give the information of the boat before the changes were made this last year. In other words, the individual cabins were taken out and made into 1 large room. The large range which was in the galley has been removed since only Hotpoint appliances are being used. Where the center cabin was removed a steel beam was put under the top deck giving it additional support. At the present there is an oil circulator in the main room on the first deck which is used for heat. It is vented and has a metal floor board underneath it. The stove is securely fastened to the deck and side so that it cannot move. There is a small container for fuel oil attached to the stove and no extra oil for the stove is carried aboard.

Attached is a slip with the following:

Fire Extinguishers:

- 1 quart "Fire Gun, Model O.
- 1 two gallon foam type extinguisher.

2 CO2 Extinguishers.

2 Fire hydrants and pumps with 50 feet of hoses.

2 Five Pound CO² extinguishers.

4 quart size tetrachloride extinguishers.

(Here follow 2 pasters, side folios 267, 268)

[fol. 267]

DEFENDANT'S EXHIBIT 1

Wilburn Boat Company, Recap of Checks Drawn

Date 1948	To Whom Paid	Amount Check	Labor Contractors Etc.	Equip.	Plans Etc.	Supplies	Dock Equip.	Sundry
Aug. 5	Texoma Boat & Dock Co.	\$ 510.99	\$ 510.99					Ldy \$ 4.25
Aug. 7	Wilburn Bros. Co.	2,138.89	345.75*	180.48		38.85		U. S. Engineers Tulsa 101.52
	Timing Gear	100.00						Tel. Calls 34.49
	Geo. Clark	38.88						Travel 1,380.55
	Foster Mill	41.60						Organ. Expense 53.00
Aug. 5	H. H. Cleveland Agency							Ins. 419.56
	5022-49	419.56						
Aug. 7	Head & Head Contrs.	500.00	500.00					
Aug. 7	W. E. Blackshear	77.91	77.91					
Aug. 7	Alton Wilburn	27.00	27.00					
Aug. 8	J. W. Roberts	45.00	45.00					
Aug. 10	Farmer Jones	29.90				29.90		
Aug. 12	J. Roberts	11.90	11.90					
Aug. 17	Neilan Bemis	200.00			200.00			
Aug. 18	Alton Wilburn	35.00	35.00					
Aug. 20	J. C. Hogan	18.00	18.00					
Aug. 21	W. E. Blackshear	91.16	91.16					
Aug. 21	Head & Head	500.00	500.00					
Aug. 23	R. J. Bullock	24.00	24.00					
Aug. 25	Wilburn Bros.	314.56	137.30		Frts.	.90		Gas & Oil 156.55
								Misc. 1.50
								Tele. 2.31
								Adv. 16.00
Aug. 27	Central Freight Lines	2,453.20		2,453.20				
Aug. 28	Bireleys Beverage Co.,							
	Cooler	59.80		59.80				
Aug. 28	Peter Spears	18.88	18.88					
Aug. 28	R. L. Williams	29.40	29.40					
Aug. 28	W. E. Blackshear	44.55	44.55					
Aug. 30	H. H. Hodge							
	Life Preservers	70.00		70.00				
Sept. 2	Head & Head	500.00	500.00					
Sept. 3	W. E. Blackshear	44.55	44.55					
Sept. 9	Central Freight lines,							
	Frts. on Motor	134.17		134.17				
Sept. 11	Alton Wilburn	22.00	22.00					
Sept. 11	W. E. Blackshear	44.50	44.50					
Sept. 13	Citizens National Bank	141.67						Interest 141.67
Sept. 16	Herb Dennis	62.82	62.82					
Sept. 17	W. E. Blackshear	44.55	44.55					
Sept. 18	Alton Wilburn	20.00	20.00					
Sept. 18	Jack Miller	10.00						
Sept. 18	Texoma Boat & Dock Co.	53.30						Adv. 10.00
Sept. 25	W. E. Blackshear	44.55	44.55					Rent 53.30
Sept. 25	Alton Wilburn	20.00	20.00					
Sept. 27	Hardwicke-Etter Co. Rake	27.54		27.54				
Oct. 2	W. E. Blackshear	44.55	44.55					
Oct. 2	Alton Wilburn	20.00	20.00					
Oct. 2	Jack Miller	15.00						Adv. 15.00
Oct. 7	Collector of Customs	82.18						Boat Admeasurement 82.18
Oct. 8	Jack Miller	4.00						Adv. 4.00
Oct. 8	R. A. Trail	60.00	60.00					
Oct. 9	W. E. Blackshear	48.95	48.95					
Oct. 9	Alton Wilburn	20.00	20.00					
Oct. 14	Grayson Fire Ext. Co.							
	Fire Hose	26.42		26.42				
Oct. 14	Roy Paul	250.00						
Oct. 18	W. E. Blackshear	44.55	44.55					Organ. Exp. 250.00
Oct. 18	A. F. Wilburn	20.00	20.00					
Oct. 20	Henry Wilburn, Bemis	100.00			100.00			
Oct. 20	Citizens National Bank	125.00						Interest 125.00

DEFENDANT'S EXHIBIT 1

Wilburn Boat Company, Recap of Checks Drawn

Date 1948	To Whom Paid	Amount Check	Labor Contractors Etc.	Equip.	Plans Etc.	Supplies	Dock Equip.	Sundry
Oct. 22	Head & Head Cont. Wilson Walters Settlement on Contract	600 00	\$ 00 00	\$	\$	\$	\$	\$
Oct. 23	W. E. Blackshear	46 65	46 65					
Oct. 25	New Way Grocery	1,442 40*	16 66	*799 62		120 45		Gas & Oil 148 42
	Fire Ext.	152 15		Frt. 9 60				Tel. 42 78
	H.&P. Hdwe.	339 45						Dock Expense 198 21
	Mattress Co.	18 00						Accounting 38 62
	Geo. Clark	120 35						Adv. 13 00
	Gen. App.	5 36						Postage & Office 25 04
	Chris Waltz	164 31						
Oct. 25	Alton Wilburn	22 00	22 00					
Oct. 27	Neilan Bemis	250 00			250 00			
Oct. 30	W. E. Blackshear	44 55	44 55					
Oct. 30	Alton Wilburn	20 00	20 00					
Nov. 1	Wilburn Bros. Gro.	3,762 12*	00 00	2,739 96		45 58		Gas & Oil 19 73
			11 87	35 12				Travel 109 56
				Motor	Expr.			
Nov. 2	Koeppen-Baldwin Re-wiring & 2 water pumps	2,065 21		2,065 21				
Nov. 2	Texoma Boat & Dock	37 24						Rent 37 24
Oct. 25	L. B. Wilburn	48 00				48 00		
Nov. 6	Alton Wilburn	20 00	20 00					
Nov. 6	W. E. Blackshear	29 68	29 68					
Nov. 8	Charlie Clark, Ramp Walk & pump-stiff arms & etc.	479 38					479 38	
Nov. 9	Gullett & Gullett	30 75						Organ. Exp. 30 71
Nov. 12	Citizens National Bank	.50						Office .50
Nov. 18	Citizens National Bank	1 13						Office 1 13
Nov. 25	Deputy Collector of Customs	4 00			4 00			
Nov. 22	W. E. Blackshear	48 88	48 88					
Nov. 27	Alton Wilburn	38 00	38 00					
Nov. 27	Alton Wilburn	20 00	20 00					
Dec. 3	First Christian Church 66 Chairs	66 00		66 00				
Dec. 6	Alton Wilburn	20 00	20 00					
Dec. 8	Koeppen-Baldwin, Plumbing	25 78		25 78				
Dec. 14	Alton Wilburn	20 00	20 00					
Jan. 1	Citizens National Bank	250 00					Interest	250 00
	Total	\$19,042 27	\$5,266 15	\$8,693 20	\$554 00	\$283 68	\$479 38	\$3,765 86

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DEFENDANT'S EXHIBIT 2

Wilburn Boat Company, Unpaid Expenses

Due New Way Grocery for Checks Drawn for Boat Co. Expense:

Oct. 25	Meals	Miscellaneous	\$ 2.35
Oct. 25	Light Bulbs	Supplies	.30
Oct. 26	Office Expense		1.95
Oct. 26	Light Bulb	Supplies	.18
Nov. 1	Charlie Ingram	Gas & Oil	8.57
Nov. 2	V. S. Scoggins	Gas & Oil	28.27
Nov. 2	N. B. McClure	Gas & Oil	7.14
Nov. 10	Telephone Bill	Telephone	17.07
Nov. 10	Gulf Oil Corp.	Gas & Oil	10.36
Nov. 10	Texas Co.	Gas & Oil	9.25
Nov. 10	Texas Co.	Gas & Oil	4.29
Nov. 10	Sinclair Refining Co.	Gas	35.97
Nov. 10	Lingo Leeper	Material & Supplies	144.42
Nov. 10	Chris Waltz	Material & Supplies	23.30
Nov. 10	Hawkins Hdwe.	Material & Supplies	7.40

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Nov. 10	Sherman-Dension Concrete Co.	Material & Supplies	44.80
Nov. 10	Farmer Jones	Material & Supplies	11.35
Nov. 10	Telephone	Telephone	3.05
Nov. 12	Charlie Ingram	Gas & Oil	7.00
Nov. 17	Oxydol	Miscellaneous	.35
Nov. 18	Purchases	Groceries	14.34
Nov. 19	Bryson	Signs	15.00
Nov. 19	Miscellaneous	Misc.	1.30
Nov. 20	Purchases	Purchases (Gro.)	2.41
Nov. 20	Battery	Misc.	.20
Nov. 15	Cash—Floats	Equipment	918.32
Nov. 16	Freight—Life Preservers	Equipment	16.32
Nov. 13	Blackie—Labor	Labor Operating	22.50
Nov. 21	Mdse. Purchased	Purchases	19.22
Nov. 21	Pans	Supplies	4.00
Nov. 24	Mdse. Purchased	Purchases	7.37
Nov. 24	Postage	Office	1.29
Nov. 25	Purchases	Purchases	.21
Nov. 23	Loan		600.00
Nov. 23	Purchases		5.05
Dec. 4	Purchases		19.10

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Dec. 4	Telephone		.66
Dec. 6	Roach—Wages	Labor—Operating	6.00
Dec. 9	Merchandise		1.50
Dec. 9	Typing Paper	Office Expense	.10
Dec. 2	Ingrams Serv. Station	Gas & Oil	1.30
Dec. 6	Briggs Weaver	Material & Supplies	42.07
Dec. 6	Donovan Boat Supplies	Equipment	197.25
Dec. 7	N. B. McClure	Gas & Oil	6.43
Dec. 4	Blackie—Labor	Labor—Operating	11.25
Dec. 13	Denison Herald	Adv.	25.20
Dec. 13	Telephone	Telephone	15.00
Dec. 13	Farmer Jones	Material & Supplies	16.04
Dec. 13	Koeppen-Baldwin	Material & Supplies	15.00
Dec. 13	Chris Waltz	Material & Supplies	.30
Dec. 13	Geo. W. Clark	Material & Supplies	21.65

DEFENDANT'S EXHIBIT 2—Continued

Wilburn Boat Company, Unpaid Expenses

Due New Way Grocery for Checks Drawn for Boat Co. Expense:

Dec. 13	Foxworth Galbreth	Material & Supplies	83 20
Dec. 13	Texas Hardware	Material & Supplies	3 29
Dec. 13	Grayson Fire Ext. Co.	Material & Supplies	5 65
Dec. 13	Taylor Printing Co.	Office Supplies	5 75
Dec. 13	Lingo Leeper	Material & Supplies	19 71
Dec. 17	Citizens Nat'l Bank	Interest	125 00

[fol. 272]

Dec. 13	Pilkiltons Garage	Misc'l.	1 23
Dec. 18	Blackie	Operating Labor	14 00
Dec. 23	Freight—Life Jackets	Equipment	2 72
Dec. 31	Merchandise		4 15
Dec. 23	Texoma Boat & Dock	Rent	64 00
Jan. 7	Telephone	Telephone	56
Jan. 7	Scoggins	Gas & Oil	9 89
Jan. 7	Credit		3 00
Jan. 7	Credit		11 00
Jan. 7	Credit		1 25
Jan. 10	Denison Herald	Advertising	8 40
Jan. 10	Sinclair	Gas & Oil	11 85
Jan. 10	Donavon Boat Supply	Equipment	60 95
Jan. 5	N. B. McClure	Material & Supplies	75
Jan. 10	Gulf Oil Corporation	Gas & Oil	7 40
Jan. 28	Credit S. S.	Motors Returned	118 80
Jan. 28	Roach—Labor	Operating Expense	5 00
Jan. 28	Postage	Office	99
Feb. 1	Chas. Ingram	Gas & Oil	1 30
Feb. 8	Cleveland Ins.	Insurance	234 01

[fol. 273]

Feb. 9	Geo. Clark	Material & Supplies	2 10
Feb. 25	Texoma Boat & Dock		373 13

Total Due William Bros.

\$3,281 31

Other Accrued Expenses:

Texas Hardware Co.	Material & Supplies	\$ 1 90
George Clarke Welding	Material & Supplies	3 80
Chris Waltz	Material & Supplies	70

\$ 6 40

Total Accrued Expenses

\$3,287 71

[fol. 274]

DEFENDANT'S EXHIBIT 3

Form No. 12

Fee: \$3.00 Filing

Filed in Triplicate

Affidavit of Payment of Amount of Stated Capital

To the Secretary of State, State of Oklahoma:

STATE OF OKLAHOMA,

County of Bryan, ss.

1. The undersigned, being a majority of the incorporators of: The Wilburn Boat Company being first duly sworn upon their oath, depose and say:

That they are a majority of the incorporators of: The Wilburn Boat Company.

2. That articles of incorporation were filed with the Secretary of State, State of Oklahoma, on July 12, 1948 and that the amount of the stated capital with which said corporation will begin business as set out in said articles is: \$40,000.00.

3. That said amount of stated capital has been fully paid in.

Dated this 10th day of July, 1948.

(S.) J. F. Wilburn, L. G. Wilburn, J. H. Wilburn,
Incorporators.

Filed 7-12-48.

Wilburn Cartwright, Secretary of State.

[fol. 275] Subscribed and sworn to before me this 10th day of July, 1948.

(S.) Clytie Wyatt, Notary Public. [Seal.]

My commission Expires: January 27, 1951.

DEFENDANT'S EXHIBIT 4

Being check in the following words and amounts:

The Citizens National Bank of Denison, Denison, Texas,
2-8-1949. No. 3533. Pay to the order of : H. H. Cleave-

land Agency \$234.01, Two Hundred & Thirty Four & 01/100 Dollars.

Wilburn Brothers—New Way Grocery, By (S.) J. F. Wilburn.

Wanderer (Policy No. YA 28579).

(Said check on back showing to have been indorsed and paid.)

DEFENDANT'S EXHIBIT 5

Being check in the following words and amounts:

The Citizens National Bank of Denison, Denison, Texas, 8-5-1948. Pay to the order of H. H. Cleaveland Agency \$419.56, Four Hundred & Nineteen & 56/100 For: Insurance on Motor Boat Wanderer from 6-9-48 to 5-22-49.

(Signed.) J. F. Wilburn.

(Said check on back showing to have been indorsed and paid.)

[fol. 276] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 277] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 13956

WILBURN BOAT COMPANY, et al.,

versus

FIREMAN'S FUND INSURANCE COMPANY

MINUTE ENTRY OF ARGUMENT AND SUBMISSION--Dated No-
vember 4, 1952. Omitted in Printing

[fol. 278] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 13956

WILBURN BOAT COMPANY, et al., Appellants,

versus

FIREMAN'S FUND INSURANCE COMPANY, Appellee

Appeal from the United States District Court for the
Eastern District of Texas

OPINION--Filed January 29, 1953

Before Hutcheson, Chief Judge, and Borah, and Rives,
Circuit Judges

BORAH, Circuit Judge:

This action is based on a policy of marine insurance and was originally instituted in the state court from whence it was removed to the civil side of the docket in the Federal District Court at Sherman, Texas, on the grounds of diversity of citizenship.

On February 25, 1949, the appellants' motor vessel Wanderer, then insured under a full marine risk policy [fol. 279] containing a fire clause, was destroyed by a fire of unknown origin while she lay afloat moored in Lake Texoma. The appellants filed a sworn statement in proof of loss, but the appellee insurance company refused to

recognize the claim because of the alleged breach of certain conditions in the policy and in consequence this action was instituted. The policy provides that the insurance shall be void in case the interest insured shall be sold, assigned, transferred, or pledged without the previous consent in writing of the assurers, and further that it is warranted by the assured that the vessel shall be used solely for private pleasure purposes and shall not be hired or chartered unless permission is granted by indorsement on the policy.

It was stipulated by and between the parties that the Wanderer was sold and transferred by the appellants J. F. Wilburn, J. H. Wilburn, and L. G. Wilburn, to the appellant Wilburn Boat Company, an Oklahoma corporation; that the vessel was not used solely for private pleasure purposes, but on the contrary was chartered and used for hire and that without the consent of the appellee the vessel was pledged by chattel mortgage on two occasions to the Citizens National Bank of Denison, Texas, and once to J. F. Wilburn and J. H. Wilburn jointly. The case was tried before the court without a jury, and after consideration of the pleadings, evidence, and the arguments of counsel the court found that a failure of performance of the terms of the contract was indisputably shown and that under the general admiralty law appellants were not entitled to recover. The controlling question presented upon this appeal is whether the trial judge rightly held that the policy is governed by the general admiralty law.

[fol. 280] Appellants claim that the contract was entered into in Texas and is subject to the statutory insurance laws of that state which prohibit a forfeiture under the circumstances here presented. More specifically, their primary contentions are that the court committed error: (1) in denying recovery under the policy because the assured encumbered the vessel without the written consent of the insurer in that such holding runs counter to V.A.T.S. Insurance Code, art. 5.37¹ which declares an "encumbrance clause"

¹ Art. 5.37 is as follows: "Any provision in any policy of insurance issued by any company subject to the provisions of this subchapter to the effect that if said property is encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any

to be null and void; (2) in holding that the assured was not entitled to recover because the vessel was hired or chartered without the written consent of the insurer in violation of the warranty of use for private pleasure purposes since there was no showing here that the use of the vessel had anything to do with the loss and absent such casual relationship, V.A.T.S. Insurance Code, art. 6.14,² prohibits a breach of the warranty from being interposed as a defense to a suit or to avoid the policy; (3) in failing to hold that they were entitled to recover under admiralty law and under the laws of Texas since the insurer knew or should have known that the Wanderer was being used commercially and [fol. 281] has waived the defense based on the breach of the warranty of private use and is estopped from relying thereon.

These being the issues, our first inquiry is to determine whether or not the circumstances here presented warrant the application of the law of the sea. We are in no doubt that the contract was maritime in its nature. Indeed, appellants admit that the policy was one of marine insurance and it affirmatively appears from the policy provisions that it covered the operation of the vessel on navigable waters of the United States without as well as within the State of Texas. Further, the vessel's operations were not confined to Texas waters. The trial court found that the waters of Lake Texoma (an inland lake between Texas and

character, then such encumbrance shall render such policy void, shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void. Acts 1951, 52nd Leg. ch. 491." (Art. 5.37 is based on Art. 4890 R. S. 1925 (Acts 1913, p. 195) without change.)

² Art. 6.14 reads as follows: "No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or applications therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property. Acts 1951, 62nd Leg. ch. 491." (Art. 6.14 is based on Art. 4930, R. S. 1925 (Acts 1913, p. 194); (Acts 1927, 40th Leg., p. 48, ch. 33, § 1, without change.)

Oklahoma) are part of the navigable waters of the United States. Appellants do not challenge this finding; there is evidence to support it; and we are satisfied that the finding is correct in fact and in law. *Davis v. United States*, 9 Cir., 185 F. (2d) 938. It has long been the settled doctrine that navigable lakes are public waters and are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States. *Insurance Company v. Dunham*, 11 Wall. (78 U. S.) 1, 26, 20 L. Ed. 90; *The Genesee Chief*, 12 How. (53 U. S.) 443, 13 L. Ed. 1058. And the courts have throughout the years recognized the learned and exhaustive opinion of Justice Story in the case of *DeLovio v. Boit*, 2 Gall. 398, F. C. No. 3,776, affirming the admiralty jurisdiction over policies of marine insurance. *Insurance Co. v. Dunham*, *supra*; see also *Robinson v. Home Ins. Co.*, 5 Cir. 73 F. (2d) 3, cert. den. 294 U. S. 712, 55 S. Ct. 508, 79 L. Ed. 1246; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 5 Cir. 49 F. (2d) 121, cert. den. 284 U. S. 628, 52 S. Ct. 12, [fol. 282] 76 L. Ed. 535. It follows that we are required to measure appellants' liability by the standards of the maritime law even though the proceeding was instituted in a common law court. See *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171.

Applying the rules of the numerous cases which have recognized the necessary dominance of admiralty principles in actions in vindication of rights arising under admiralty law, we hold that because of their admitted breaches of this contract assureds may not recover on it. Under general maritime law, contracts of insurance must be enforced as written and this court, in common with other courts, so holds. *Home Ins. Co. v. Ciconett*, 6 Cir., 179 F. (2d) 892; *Robinson v. Home Ins. Co.*, *supra*; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, *supra*. In *Home Ins. Co. v. Ciconett*, the court, in language which we approve, declared: "It is settled that a warranty in a contract of insurance must be literally complied with; that the only question in such cases is whether the thing warranted to be performed was or was not performed; and that a breach of the warranty releases the company from liability regardless of the fact that a compliance with the warranty would not have avoided the

loss. *Shamrock Towing Co. v. American Insurance Co.*, 2 Cir., 9 F. 2d 57, 60; *Fidelity-Phenix Ins. Co. v. Chicago Title & Trust Co.*, 7 Cir., 12 F. 2d 573; *Whealton Packing Co. v. Aetna Insurance Co.*, 4 Cir., 185 F. 108; *Aetna Insurance Co. v. Houston Oil & Transport Co.*, 5 Cir., 49 F. 2d 121, 123-124. See also *Norwich Union Indemnity Co. v. H. Kobacker and Sons Co.*, 6 Cir., 31 F. 2d 411, 414; *Imperial* [fol. 283] *Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231. The General Admiralty Law, as shown by the foregoing cases, is applicable. *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 243-245, 63 S. Ct. 246, 87 L. Ed. 239."

This record fully supports the finding of the trial court that the warranty of private use was breached. Appellants do not deny the breach, but insist that the insurer waived this defense and is estopped from setting it up for the reason that the Wanderer was surveyed at insurer's request while the policy was in effect and appellee knew or should have known from a plain statement in the survey report that the vessel was being used commercially and failed to cancel the policy. But what appellants overlook, and what is fatal to their contention, is that the policy provided that the waiver of any provision or condition of the contract shall be written upon or attached thereto. Such a provision is reasonable, valid and binding on the assured. *Adalian's, Inc. v. Fidelity-Phenix Fire Ins. Co. of New York*, 5 Cir., 81 F. (2d) 226, 227; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, *supra*; *Christian & Brough Co. v. St. Paul Fire & Marine Ins. Co.*, 5 Cir., 5 F. (2d) 489. And, as was rightly found by the trial court, no permission was ever granted by indorsement on the policy for use other than for private pleasure purposes. We hold that the insurer is not barred from relying upon the appellants' breach of the "use" warranty. But even if the situation were otherwise, which it is not, appellants have admitted without qualification or defense that they breached the provision in the policy against selling, assigning, transferring, and pledging the vessel. We need not therefore labor the point, as one breach is sufficient.

[fol. 284] There remains for consideration the question as to whether appellants may invoke the laws of Texas to "modify or correct" the principles of general maritime law

enunciated in the *Aetna* case. Appellants concede that the admiralty courts should continue to construe the terms found in a marine insurance policy, such as the watchman's clause, the perils of the sea clause, or any other classic marine insurance clause, provided, that the federal decisions do not conflict with the regulatory insurance statutes of the several states. They contend that "the issue in this case is not whether general admiralty law applies in construing the terms used in marine policies or whether or not an admiralty court has jurisdiction over marine insurance litigation", but that "the question here presented is whether or not general admiralty law supersedes and overrides the insurance statutes of the State of Texas regulating the insurance business conducted within the state". We are no more impressed by this argument than was the trial court. Taking appellants' contentions as we find them, and deciding the case, as we should, upon principles of admiralty and maritime law rather than upon the common law of Texas as amended by statute, we are of opinion that the hostile conflict which appellants claim here exists and which indubitably does exist precludes the applicability of the state law.

It is clear from the authorities that state law is admissible to modify or supplement admiralty and maritime law only when the state action is not hostile to characteristic features of the maritime law. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S. Ct. 438, 64 L. Ed. 834; *Union Fish Co. v. Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 251, see *Just v. Chambers*, 312 U. S. 383, 61 S. Ct. 687, 85 L. Ed. 903. The [fol. 285] following cases upon which appellants rely are but some of the instances in which the courts have held that state law, as construed and applied, did not interfere with any characteristic feature of the maritime law. *Just v. Chambers*, *supra*; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. These cases are not apposite. It is the settled doctrine that a marine contract of insurance is "derived from" is "governed by", and is a "part of" the general maritime law of the world. *Insurance Co. v. Dunham*, *supra*. A cause of action on a marine insurance policy is a cause of action in admiralty and when it is asserted in a court of law its substance is unchanged. *Panama Agencies Co. v. Franco*, 5 Cir., 111 F.

(2d) 263, 266. The right of a common law remedy so saved to suitors does not include attempted changes by the states in the substantive admiralty law. *Cushing v. Maryland Cas. Co.*, 5 Cir., 198 F. (2d) 536, 538. There is and can be no doubt that this suit which challenges the validity and effect of the terms of a maritime contract does involve a characteristic feature of substantive admiralty law. Therefore the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by Texas courts have no application to the present situation.

In support of appellants' relative contention that the Texas laws on which they rely are regulatory in nature, *Hooper v. California*, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297, is cited as authority for the proposition that a contract of marine insurance is not within the regulatory power of Congress under the commerce clause of the constitution and therefore is subject to state regulation. Acknowledging that the *Hooper* case was overruled in *United* [fol. 286] *States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, appellants argue that the earlier decision was reinstated by the McCarran Act of March 9, 1945, 15 U. S. C. Sec. 1011, 1012, in which Congress declared that the business of insurance shall be subject to the laws of the states which relate to the regulation or taxation of such business. We think otherwise and are of the opinion that the McCarran Act was passed to meet the *South-Eastern Underwriters Assn.* case and that the Act only concerns the power of Congress to sustain existing and future state legislation from attack under the commerce clause of the Constitution. *Prudential Insurance Company v. Benjamin*, 328 U. S. 408, 66 S. Ct. 1143, 90 L. Ed. 1342. However, and what is here important, is that admiralty and maritime law does not depend for its effect upon the power of Congress to regulate commerce. *Knickerbocker Ice Company v. Stewart*, *supra*; *The Belfast*, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266; *The Genesee Chief*, *supra*. We are clearly of opinion that the *Hooper* case and the McCarran Act have no application here, and, if more need be said, the *Hooper* case does not involve a conflict between state law and the law of admiralty and cannot aid appel-

lants even if, as they contend, it has been revived by the McCarran Act.

The other contentions raised by appellants have been carefully considered but do not merit discussion. The judgment was right and it is

Affirmed.

[fol. 287] IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

No. 13956

WILBURN BOAT COMPANY, et al.,

versus

FIREMAN'S FUND INSURANCE COMPANY.

JUDGMENT—January 29, 1953.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Wilburn Boat Company, and Others, and the surety on the appeal bond herein, Aetna Casualty and Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 288] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 285] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

WILBURN BOAT COMPANY ET AL., Petitioners,

VS.

FIREMAN'S FUND INSURANCE COMPANY

ORDER ALLOWING CERTIORARI—Filed April 26, 1954

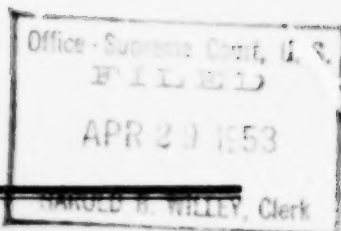
The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

(5626)

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No. ~~158~~ ~~3~~ 7

Supreme Court of the United States

October Term, ~~1952~~ 1954

THE WANDERER

WILBURN BOAT COMPANY, ET AL.,

Petitioner-Appellants Below,

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,

Respondents-Appellees Below

**Petition For Writ of Certiorari To The United
States Court of Appeals For The
Fifth Circuit**

ALEXANDER GULLETT

and

T. G. SCHIRMMEYER

Of Counsel

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Attorney for Petitioners

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Supreme Court of the United States

October Term, 1952

No. _____

THE WANDERER

WILBURN BOAT COMPANY, ET AL.,

Petitioner-Appellants Below,

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,

Respondents-Appellees Below

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

Petitioners pray for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 29, 1953, affirming the judgment of the District Court of the United States for the Eastern District of Texas in favor of Respondent insurance company and ordering final judgment for Respondent.

Opinions Below

The District Court did not file Findings of Fact and Conclusions of Law pursuant to Rule 52 of the FEDERAL RULES OF CIVIL PROCEDURE but instead wrote an opinion in letter form which, after the death of the late Judge Randolph Bryant, was accepted by the parties hereto in lieu of Findings of Fact and Conclusions of Law and was made a part of the Judgment (R. 32-34). The Trial Court's decision is unreported. The opinion of the Fifth Circuit Judges of the Court of Appeals (R. 278-286) is reported in 201 F. 2d 833, 1953 AMC 284. This decision of the Fifth Circuit Court in effect reverses its ruling in *MARYLAND CASUALTY COMPANY v. CUSHING*, 198 F. 2d 536, 1952 AMC 1803. The latter decision is now pending in this court, No. 498, October Term, 1952.¹

Jurisdiction

The Judgment of the Court of Appeals was entered January 29, 1953 (R. 278). No petition for rehearing was filed. The jurisdiction of this court is invoked under 28 USC 1254 (1).

Questions Presented

1. Where a marine insurance policy is sold within the boundaries of a State, to citizens of the State, by a foreign corporation authorized to do business in the State, can the State legislature enact insurance laws which regulate the terms of a marine insurance policy and the defenses available to such foreign insurance company?

¹ The cases differ in that a specific substantive right of admiralty law is challenged in *Maryland Casualty Company v. Cushing*, No. 498, to-wit: The Limitation of Liability Statute. In the instant case no substantive right of admiralty law is involved.

In *HOOPER V. CALIFORNIA*, 155 U.S. 648 this court answered the above question in the affirmative. The Fifth Circuit disregarded this ruling and answered the question in the negative.

2. Is the general admiralty law so broad in its scope as to regulate the marine insurance business to the exclusion of State insurance laws regulating the issuance of insurance policies and the available defenses thereunder?

In *NUTTING V. MASSACHUSETTS*, 183 U.S. 553 this court answered the above question in the negative. The Fifth Circuit disregarded this ruling and answered the question in the affirmative.

3. Is the marine insurance business to be excluded from the plain and inclusive language of the McCarran Act of 1945 (16 USC Sec. 1012), which reads in part as follows:

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

This court has not ruled on this question. The Fifth Circuit held that the McCarran Act is not applicable to cases involving marine insurance policies.

4. Are State insurance laws, which declare an encumbrance clause in an insurance policy to be void and which provide that an insurance company cannot void a policy on the grounds of breach of warranty unless the breach contributes to the loss, nullified by general admiralty law and by the United States Constitution because of an alleged violation of some characteristic feature of substantive admiralty law and Article III, Section 2 of the UNITED STATES CONSTITUTION?

The Fifth Circuit answered this question in the affirma-

tive. This court has not ruled on this specific legal question.

5. Are all or part of the State insurance laws regulating the insurance business rendered impotent by the "uniformity of law doctrine" adopted by this court in the *JENSEN* case and related decisions,² and can this doctrine be extended to include maritime contract cases?

This court has answered the above question in the negative. The Fifth Circuit answered the above question in the affirmative and in particular relies on this court's ruling in *KNICKERBOCHER ICE CO. v. STEWART*, 253 U.S. 149 (1920), which is a Workmen's compensation case.

6. Can the sovereign right of a State to regulate foreign corporations doing business within its boundaries be impaired by general admiralty law when Congress has declared that the continued regulation by the several States of the business of insurance is in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation of such business by the several States.³

This court has not ruled on the above legal question. The Fifth Circuit answered the above question in the negative in *CUSHING v. MARYLAND CASUALTY CO.*, 198 F. 2d 536, 198 F. 2d 1021 and in the affirmative in *WILBURN BOAT CO. v. FIREMAN'S FUND INSURANCE CO.*, 201 F. 2d 833, the instant case.

² See *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), and *Knickerbocher Ice Co. v. Stewart*, 253 U.S. 149 (1920). Both cases relate to tort claims and the validity of State Workman Compensation Acts for injuries received on navigable waters and do not extend the doctrine of uniformity to maritime contract cases. *Standard Dredging Co. v. Murphy*, 319 U.S. 306, limits the application of the uniformity doctrine to Workman Compensation cases.

³ The McCarran Act, 15 U.S.C.A., Sec. 1011. Congress did not exclude the marine insurance business from the provisions of the McCarran Act but the Fifth Circuit Court of Appeals in effect did.

Constitutional and Statutory Law Involved

Art. III Section 2—UNITED STATES CONSTITUTION.

"The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction * * *."

Title 28—UNITED STATES CODE, Section 1333.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Title 15—Title 15 UNITED STATES CODE, Sections 1011 and 1012.

THE McCARRAN ACT OF 1945.

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: * * *."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

VERNON'S TEXAS STATUTE, Chapter 10, entitled "*State Insurance Commission*". Article 4890—*Lien on insured property*.⁴

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTE Chapter 11, entitled "*Fire and Marine Companies*". Article 4930—*Breach by Insured*.⁵

"No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application thereof, upon personal property, shall void the policy or contract or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Statement of the Case

Petitioners, citizens of Texas, purchased a marine insurance policy from Respondent, a foreign insurance company, in order to cover their Motorboat WANDERER

⁴ In 1951 the Texas insurance statutes were revised and Article 4890 became Section 5.37 of the **Insurance Code of 1951**. There is a slight change in the wording of the two statutes.

⁵ Section 6.14 of the **Texas Insurance Code of 1951**, is identical to Article 4930.

against all marine risks including fire. Subsequent to the effective date of the policy the WANDERER was completely destroyed by fire.

The policy was purchased in Denison, Texas, from a Texas insurance agent who delivered the policy to Petitioners in Denison, Texas. The policy was payable in Denison, Texas. According to Texas insurance laws the insurance agent was Respondent's agent.⁶ Respondent is a foreign insurance corporation authorized to transact insurance business in Texas and has an agent in Texas for service of process. The contract of insurance was made and entered into under and by virtue of the laws of Texas.⁷

The WANDERER was destroyed by fire while she lay moored in Lake Texoma, an inland lake between Texas and Oklahoma. There is no question in this case that the fire clause in the policy covered the loss in question.

The Respondent insurance company refused to pay the Petitioners for the total loss of the WANDERER on the grounds that certain conditions or warranties, not connected with the loss, had been breached. One of the warranties relied upon by the insurance company is an encumbrance clause.⁸ Article 4890 of the Texas insurance statutes⁹ declares this warranty to be null and void. The encumbrance clause of the policy in effect provides that the insurance coverage shall be void in case the insured vessel is mortgaged without the insurance company's previous consent in writ-

⁶ Vernon's Revised Texas Statute of 1925, Article 5056.

⁷ Vernon's Revised Texas Statute of 1925, Article 5051.

⁸ The clause is worded as follows (R. 241):

"It is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the assurers."

⁹ Vernon's Revised Texas Statute of 1925, Article 4840 quoted above.

ing. The petitioners admit that they mortgaged the WANDERER without the written consent of the Respondent insurance company. Both the Lower Courts ruled that this breach of warranty defeated Petitioner's right to recover for the total loss of the WANDERER, and that Article 4890 of the TEXAS STATUTES was inapplicable because it is nullified by general admiralty law. (R. 282).

While the policy was in effect Petitioners incorporated their partnership and transferred the WANDERER from their partnership to their corporation. The question of whether this transfer of the vessel constitutes a breach of warranty is not presented to this Court because it involves points of law not ruled on by the Lower Courts.

Respondent also declared the insurance coverage on the WANDERER was forfeited on the grounds that according to the terms of the policy the WANDERER could only be used for private purposes,¹⁰ and that at some remote time prior to the destruction of the WANDERER, the Petitioners chartered their motorboat without first obtaining permission from Respondent. Petitioners admit that they had chartered the WANDERER but deny that the policy in question was forfeited because under the insurance laws of Texas a breach of a warranty relating to the use of personal property will not void the policy or constitute a defense to a suit on an insurance policy, unless such breach or violation contributed to bring about the destruction of the property.¹¹

¹⁰ The warranty of use clause is worded as follows (R. 236):

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement."

¹¹ **Vernon's Revised Texas Statute 1925**, Article 4930, quoted above.

It is conceded that chartering of the WANDERER prior to its destruction had nothing to do with the loss in question. The WANDERER had been at a shipyard for quite some time prior to the loss and when it burned the vessel was moored to a buoy, a safe distance from shore and was not in use.

Again the lower Courts disregarded the Texas Insurance statute regulating the insurance business conducted within its boundaries and also disregarded The McCarran Act because the Courts believed that the Texas insurance statutes "involve a characteristic feature of substantive admiralty law" (R. 285), and therefore neither the Federal Statute or State insurance statutes could apply to a marine insurance policy. The precise characteristic feature of admiralty substantive law involved in this case is not pointed out by either lower Court. To support its legal conclusion the Trial Court applied the locality test (R. 32-34), used only in maritime tort cases, to a maritime contract case, contrary to the fundamental principles of maritime law.¹² The Circuit Court on the other hand appears to be impressed by the "uniformity doctrine" of the *KNICKERBOCHER ICE COMPANY v. STEWART*, 253 U.S. 149, and extended this doctrine, which has been restricted by this Court to cases involving tort claims under Workman Compensation cases,¹³ to a cause of action based on a marine insurance policy.

¹² *New England Marine Insurance Co. v. Dunham*, 78 U.S. 1 (1870), 20 L. Ed. 90.

¹³ *Standard Dredging Company v. Murphy*, 319 U.S. 306, 309, 1943.

Reasons For Granting The Writ

I.

a Judicial Function to Regulate the Marine Insurance business.

Never before has an attempt been made to extend the scope of general admiralty law to include the regulation of marine insurance business and thereby exclude State admiralty insurance statutes. It is a characteristic feature of admiralty law that the regulation of the marine insurance business be left to legislative bodies and not to the judicial branch of the government. The English "MARINE INSURANCE ACT OF 1906" is a classical example.¹⁴ Under the regulation the marine insurance business grew to such extent that the combined surplus of the marine insurance companies now exceeds one billion dollars. One of the reasons urged for the granting of this writ is that under existing statutes and decisions the State insurance acts regulating the marine insurance business have never been and should not be nullified by general admiralty law. *McCarran Act of 1945* (15 U.S.C. 1011); *HOOPER v. CALIFORNIA*, 155 U.S. 648.

II.

Congress Has Acted.

Congress by the enactment of the *McCarran Act* (15 U.S.C. 1011) gave to the several States the power to pass admiralty statutes governing the insurance business, including the marine insurance business. The lower Court in

¹⁴ See *Arnould on Marine Insurance*, 13th Ed., Vol. 2, pages 1226 for a copy of the Act and, *Winters on Marine Insurance*, Ed., pages 1 to 31 for a history of the development of marine insurance regulations in Europe and United States.

construing this Act limited its application to insurance cases involving the commerce clause of the Constitution and ruled that the *McCarran Act* is inapplicable to a marine insurance business (R. 286). There is nothing in the wording of the *Act* itself or in its background which will support the lower Court's decision that the marine insurance business must be excluded from the *McCarran Act*.

If the lower Court's decision is correct then the *McCarran Act* must be declared unconstitutional because it is the purpose of the *Act* to include all insurance business. If the marine insurance business is excluded from the *McCarran Act* then the *Act* is unconstitutional because such a ruling would make the *McCarran Act* discriminatory. *HOOPER v. CALIFORNIA*, 155 U.S. 648. In order to clarify the scope and status of the *McCarran Act* this petition should be granted.

III.

Power of State to Regulate Insurance Business.

The power of a State to regulate marine insurance business conducted within its boundaries cannot be impaired by general admiralty law even though a marine insurance policy has been declared a maritime contract for jurisdictional purposes. *INSURANCE CO. v. DUNHAM*, 78 U.S. 1 (1870). This Court in *HOME INSURANCE CO. v. DICK*, 281 U.S. 397, 410 (1930); *NUTTING v. MASSACHUSETTS*, 183 U.S. 553; *NEW YORK INSURANCE CO. v. CRAVEN*, 178 U.S. 389, and *HOOPER v. CALIFORNIA*, 155 U.S. 648, held that a State can regulate the marine insurance business. In the *NUTTING* case this court stated:

"A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such

conditions as the State may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but is a mere incident of commercial intercourse."

In *HOOPER V. CALIFORNIA*, 155 U.S. 648, 655, 656, this Court held:

"The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they are formed for the purpose of doing fire or a marine insurance business, * * *. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation * * *. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course to the paramount authority of the Constitution of the United States."

The Respondent has not shown that the authority of the Constitution of the United States has been impaired by the insurance statutes of the State of Texas mentioned in this petition and in view of the previous decisions of this Court it is clear that the Texas insurance statutes do not conflict with the United States Constitution. Neither is there anything, relating to the Texas insurance statutes, hostile to the characteristic features of maritime law albeit the Fifth Circuit Court of Appeals decision seems to indicate that a characteristic feature of substantive admiralty law is involved.

In *CUSHING V. MARYLAND CASUALTY CO.* (5 Cir.), 198

F. 2d 536, pending in this Court No. 498, State law was allowed to govern in a case involving a marine insurance policy even though substantive admiralty law was involved, to-wit: The Limitation of Liability Statute (46 U.S.C. 186). No substantive admiralty law is involved in the instant case but nevertheless the State insurance statutes were held to be inapplicable. In a previous decision by the Fifth Circuit Court in *AETNA INS. CO. v. HOUSTON OIL & TRANSPORT CO.*, 49 F. 2d 121, 1931 A.M.C. 995, that Court held that Texas laws were inapplicable in a case where a watchman's clause in a marine insurance policy was construed.

The Court used the following language:

"The policy covered the vessel in navigable waters of the United States without as well as within the State of Texas. It was a maritime contract and therefore governed by the general admiralty law and not the law of the State of Texas," citing *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Peters v. Veasey*, 251 U.S. 121; *Union Fish Co. v. Erickson*, 248 U.S. 308.¹⁵ The laws of Texas have no application to the case."

HOME INS. CO. v. CICONNETT (6 Cir.), 179 F. 2d 892; *SHAMROCK TOWING CO. v. AMERICAN INSURANCE CO.* (2 Cir.), 9 F. 2d 57; *WHEALTON PACKING CO. v. AETNA INSURANCE CO.* (4 Cir.), 185 Fed. 108, cited in the lower Court's opinion in the instant case (R. 282) all relate to the construction of a watchman's clause in a marine insurance policy and do not discuss the validity of State insurance statutes and their application to a marine insurance policy. In reaching its decision the Lower Courts did not

¹⁵ None of these cases relate to the marine insurance business and the right of a State to regulate marine insurance companies doing business within its boundaries nor do they indicate by what general admiralty law State insurance statutes are rendered inapplicable.

properly construe the McCarran Act but merely applied the above language of *AETNA INS. CO. v. HOUSTON OIL & TRANSPORT CO.*, 1931 A.M.C. 995, 1000, to the case at bar in spite of the fact that this decision antedates the McCarran Act by fourteen years. The Petitioners challenge the rule of the *AETNA* case as well as the ruling in the case at bar to the effect that State insurance statutes relating to the provisions of a marine insurance policy are rendered null and void by general admiralty law.

IV.

Conclusion

Petitioners accordingly respectfully submit that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

HOBERT PRICE,
Attorney for Petitioners

ALEXANDER GULLETT
and
T. G. SCHIRMAYER
Of Counsel

April, 1953

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IN THE
Supreme Court of the United States

October Term, 1954

No. 7

WILBURN BOAT COMPANY, ET AL.,
Petitioners

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,
Respondent

On Writ of Certiorari to the United States Court
of Appeals, Fifth Circuit

BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States

October Term, 1954

No. 7

WILBURN BOAT COMPANY, ET AL.,
Petitioners

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,
Respondent

On Writ of Certiorari to the United States Court
of Appeals, Fifth Circuit

BRIEF FOR PETITIONERS

A.

Opinions Delivered Below

The opinion of the District Court is unreported. It is incorporated in the judgment of the Trial Court (R. 19, 20). The opinion of the Fifth Circuit Court of Appeals (R. 199-206) is reported in 201 F. 2d 833, 1953 AMC 284.

B.

Jurisdiction

Jurisdiction of the court was invoked by petition for certiorari under 28 USC 1254 (1), Certiorari was granted on 26 April 1954 (R. 207).

C.

Constitutional Provisions and Statutes Involved

Article I, Section 8, Clause 3—UNITED STATES CONSTITUTION

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Article III, Section 2—UNITED STATES CONSTITUTION

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *, to all Cases of admiralty and maritime jurisdiction; * * * to Controversies between * * * Citizens of different States, * * *."

Article X—AMENDMENT TO THE UNITED STATES CONSTITUTION

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 15—UNITED STATES CODE, Chapter 20, "Regulation of Insurance" 15 USC 1011-1015.

The McCarran Act

15 USC 1011—*"Declaration of policy."*

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

15 USC 1012—*"Regulation by State Law; Federal law relating specifically to insurance; applicability of Certain Federal laws after June 30, 1948."*

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; * * *."

15 USC 1014—*Applicability of Merchant Marine Act of 1920.*

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the * * * Act of June 5, 1920, known as the Merchant Marine Act, 1920.

28 USC 1333—*Admiralty, Maritime and Prize Cases*

"The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Applicable State Statutes

VERNON'S TEXAS STATUTES—Chapter 10, Revised Civil Statutes 1936, Article 4890—entitled "*Lien on Insured Property*" (1951 Texas Insurance Code, Art. 5.37)

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void and shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTES—Chapter 10, Revised Civil Statutes 1936, Article 4930, entitled "*Breach by Insured*" (1951 Texas Insurance Code Art. 6.14)

"No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

VERNON'S TEXAS STATUTES—Chapter 21, Revised Civil Statutes 1936, Article 5054, entitled "*Texas Laws Govern Policies*" (Art. 21.42 of 1951 Texas Insurance Code)

"Any Contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract

was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

D.

Questions Presented for Review

1. Are the insurance statutes of Texas, regulating the terms of a marine insurance policy in reference to the encumbrance and use of a small boat, rendered inapplicable by general admiralty law in a case where a foreign corporation, authorized to do business in the State, issues a marine insurance policy to citizens of that State?
2. Does Article III, Section 2 of the United States Constitution exclude marine insurance from the McCarran Insurance Act of 1945 (15 USC 1011-1015) so that States cannot regulate the business of marine insurance conducted within its boundaries by foreign corporations authorized to do business within the State?
3. Where there is no proof in the record that three named individual assureds changed their interest in their vessel, can the transfer of said vessel from their partnership to their corporation be construed as a sale under the terms of an alienation clause and thereby cause their rights to be forfeited?

E.

Concise Statement of the Case

(a) PERTINENT FACTS

This lawsuit was originally instituted in the Texas State Court at Denison, Texas, from whence it was removed to

the civil side of the docket in the Federal District Court at Sherman, Texas, on the grounds of diversity of citizenship.

Petitioners are citizens of Texas and are marine insurance policy holders seeking to recover from respondent insurance company for the loss of their Motorboat WANDERER which was destroyed by fire on February 25, 1949, while she lay afloat, moored close to shore, in Lake Texoma, an artificial inland lake between Texas and Oklahoma.¹

The WANDERER was a small wooden inland vessel, 65 x 17 x 3 feet with a six cylinder 225 H.P. engine. The vessel's registered hailing port was Denison, Texas, and she was documented in Houston, Texas (R. 52) for miscellaneous service (R. 49). Petitioners purchased the houseboat WANDERER from Marshall and Shuler of Rock Island, Illinois, and each of the petitioners acquired an undivided one-third interest in the vessel (R. 43-44).

Respondent is a fire and marine insurance company incorporated in California, with its principal office in San Francisco, and was qualified and certificated to do business in the State of Texas at the time the policy was issued and delivered to petitioners at Denison, Texas. According to respondent's sworn statement, which is of public record in Austin, Texas, Fireman's Fund Insurance Company agreed to comply with the Texas insurance laws for the year ending May 31, 1949, in accordance with the provisions of Chapter 11 and 18, Title 78, REVISED CIVIL STATUTES, TEXAS, 1925. (See Appendix A) Chapter 11 is entitled "Fire and Marine Companies".

The policy in question was purchased from R. L. McKinney

¹ See Stipulation of Facts (R. 23-25). Most of the pertinent facts are stated therein.

Agency, an insurance agency doing business in Denison, Texas, and the premiums were delivered to this agency at Denison, Texas (R. 89). The McKinney Agency delivered the policy to petitioners at their place of business in Denison, Texas (R. 61) and the policy was made payable at Denison, Texas (R. 168). The McKinney Agency transmitted the order for insurance to respondent insurance company through the H. H. Cleaveland Agency, of Rock Island, Illinois, whose authority to issue policies of insurance was limited to the Rock Island, Illinois area.² R. L. McKinney examined, inspected and evaluated the risk and made a survey of the boat for respondent and reported to respondent concerning the risk (R. 64, 193). Prior to the loss of the WANDERER, R. L. McKinney requested respondent to increase the insurance coverage from \$10,000.00 to \$40,000.00 (Rossow Deposition pp. 29, 30). For an additional premium respondent agreed to increase the valued policy to \$40,000.00 (R. 167). After the increased risk was accepted, respondent sent the Denison, Texas agency an application form for the coverage in question. Mr. McKinney typed in the answers to numerous questions propounded by respondent and had J. F. Wilburn sign the application (R. 65, 67, 68, 190 to 194). This application stated that the WANDERER was to be used for commercial purposes and was to be chartered (R. 68, 191). The application was forwarded to respondent on February 9, 1949 and was in respondent's possession at the time the WANDERER was destroyed (R. 69, 97). The R. L. McKinney Agency knew that the Wilburn brothers incorporated their partnership and thought he had so advised respondent (Rossow Exhibit # 41). All correspondence between the parties concerned is found attached

² Depositions of White, p. 12 and Rossow, p. 42. White Exhibit No. 1.

to the depositions of P. B. White and E. H. Rossow, sent to this Court as an original exhibit.

Effective as of June 9, 1948, respondent issued a policy of marine insurance to "Frank and Henry Wilburn d/b/a Wilburns Bros., Denison, Texas," covering the WANDERER against fire loss (R. 168, 169). This was accomplished by attaching an endorsement on a "Port Risk" policy issued to Marshall and Shuler, the former owners of the WANDERER. On July 10, 1948, the three brothers changed their partnership to a corporation (R. 197) and each of the named assureds retained their same interest in the boat, in that they each owned one-third of the stock of the corporation (See Appendix B). After the three brothers incorporated their partnership the respondent by written endorsement changed the named assureds to read as follows: "Glen, Frank and Henry Wilburn d/b/: Wilburns Boat Company" (R. 165). This endorsement was effective August 6, 1948. No provision in the policy required the Wilburn brothers to do business as a partnership or corporation while they conducted their business in the name of Wilburn Boat Company.

(b) ALLEGED POLICY VIOLATIONS

1. MORTGAGING THE WANDERER

Respondent seeks to avoid liability under the terms of the policy on the grounds that the policy in question is null and void because petitioners admit that they mortgaged the WANDERER without the written consent of respondent. (R. 23, 24) The pertinent policy provision reads as follows (R. 176):

"It is Also Agreed that this insurance Shall be void in case this Policy or the interest insured thereby shall be

* * * pledged without previous consent in writing of the Assurer."

The insurance statutes of Texas declare that the above policy provision is null and void.³

Respondent contends, and the lower court ruled, that this Texas statute cannot apply to a marine insurance policy because it is contrary to general admiralty law and that admiralty law governs to the exclusion of State insurance regulations regarding the encumbrance of property (R. 205). The lower court held that the above encumbrance clause involves characteristic features of substantive admiralty law (R. 204) and that under admiralty law marine insurance contracts must be enforced as written. (R. 202). This legal axiom is as common to common law as it is to admiralty law. It is significant that admiralty law does not recognize a common law mortgage⁴ and it is not a characteristic feature of admiralty law.

2. BREACH OF WARRANTY OF USE

Respondent also contends that since petitioners admit that they chartered the WANDERER several times prior to the loss (R. 62), without an appropriate endorsement on the policy, they thereby breached the contract of insurance and cannot recover for the loss of the WANDERER. The warranty alleged to be breached reads as follows (R. 173):

³ Vernon's Texas Civil Statutes, Article 4890.

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

⁴ *Bogart v. The John Jay* (1854), 17 How. 58 U.S.) 399; *The J. E. Rumbell* (1892), 148 U.S. 1, 15, 16.

"Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and shall not be hired or chartered unless permission is granted by endorsement hereon."

This defense is urged by respondent notwithstanding the fact that the Texas legislature has declared that a breach of a warranty, of any contract of insurance upon personal property, will not constitute a defense to a suit for the loss thereof, "unless such breach or violation contributed to bring about the destruction of the property."⁶

The chartering of the WANDERER at some remote time previous to the loss did not, and could not, contribute to the loss of the vessel. Several days previous to her destruction the WANDERER returned to her mooring at Burns Run Resort on the Oklahoma side of Lake Texoma, after having left a shipyard on the Texas side of the lake, and was unmanned and was not being used for any purpose when she was lost (R. 63).

The lower court disregarded the Texas causal relation insurance statute⁶ on the grounds that since a maritime contract was involved general admiralty would govern to

⁶ Vernon's Texas Civil Statutes, Article 4930.

"No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property."

Also see—**Springfield Fire and Marine Insurance Co. v. K.M.A. Fuel Co.**, 78 S.W. 2d 1053 (1935) construing the above statute in a case where the use of a motor vehicle was involved.

⁶ See Footnote 5.

the exclusion of State statutes. The rule that warranties must be literally complied with in an insurance contract is as much a part of the common law as of admiralty law. See *Fire Insurance Co. v. Coos County* (1894), 151 U.S. 452, a common law action of assumpsit upon a fire insurance policy insuring a court house. This case was relied upon by the lower court to establish the rule that general admiralty law governs (R. 203). It was because of the rule in *Coos County* case that Texas enacted a statute requiring the insurance company to prove that the breach of warranty contributed to the loss. The people in Texas felt that foreign insurance companies doing business in Texas should not issue policies limiting their insurance coverage by a continuing warranty unless the breach of the warranty contributed to the loss. Respondent questions the right of Texans to so limit warranties in a marine insurance policy. The answer to the objection is that petitioners contracted to do business with the people of Texas in accordance with the provisions of their insurance statutes and the premiums charged Texans should take into account the statutory limitations herein presented.

3. THE SALE OF THE WANDERER

Respondent also seeks to avoid liability under the terms of the policy in question on the grounds that on September 28, 1948, petitioners transferred the WANDERER from J. H. Wilburn, J. F. Wilburn and L. G. Wilburn to their corporation, Wilburn Boat Company (R. 51) without the written consent of respondent. The policy provision relied upon by respondent reads as follows (R. 176):

"It is Also Agreed that this insurance shall be void in case this Policy or the *interest insured* thereby shall be

sold, assigned, transferred or pledged, without previous consent in writing of the Assurer" (Emphasis Supplied).

There is no proof in the record that the insured interest of the three named individuals changed when they transferred their boat to their corporation. Except for the corporate fiction, the one-third interest of each of the Wilburn brothers in the WANDERER remained unchanged. Nevertheless, the lower court held that the petitioners sold their boat to their corporation and this sale was a breach of the warranty quoted above and that petitioners thereby lost whatever contractual rights they had. On this point petitioners take issue on common law grounds.

Additional defenses, based on alleged concealment and misrepresentation were pleaded by respondent but the lower courts did not rule on same and they present no issue here.

(c) THE LOSS WAS COVERED

There is no question that the loss of the WANDERER was covered by the standard marine perils and fire clause, in the marine hull policy now being considered. The pertinent part of this clause reads as follows (R. 173) :

"Touching the adventures and perils which we, the assurers, are contended to bear, and do take upon us, they are of the seas, man-of-war, fire, * * *."

Respondent raises no issue concerning the coverage of this standard marine insurance clause. There is no issue and no proof as to the cause of the fire which destroyed the WANDERER or the applicability or construction of the above clause. The insurance company's attack is based upon the breach of other policy provisions designed to cut down the above sea peril and fire coverage. On the one hand, respondent relies on the sanctity of their finely printed

marine insurance contract and on the other hand, petitioners rely on the sanctity of the State insurance statutes which are designed to prevent insurance companies from whittling down liability on an accepted risk. It therefore appears that the controlling issue presented for review is whether or not Texas insurance laws apply to a marine insurance policy issued to Texans by a foreign corporation authorized to do business in Texas when the policy insures a small inland vessel against fire loss. According to the Texas insurance statutes, Texas laws govern this policy.⁷ If the laws of Texas are applicable to a foreign corporation authorized to do business in Texas then, in spite of the argument that general admiralty law governs, petitioners are entitled to recover the amount of their valued policy plus interest from February 25, 1948.

F.

Argument

Point I

General Admiralty Law does not outlaw the State Insurance Statutes regulating foreign corporations doing business within the State.

(a) INSURANCE IS NOT COMMERCE

Ever since insurance became an established business in this country repeated efforts have been made by foreign insurance corporations to shake themselves loose from the insurance regulations of the several States. To accomplish this purpose efforts were made to have this Court declare

⁷ Vernon's Texas Statutes—Chapter 21, Revised Civil Statutes, 1936, Article 5054, entitled "**Texas Laws Govern Policies**" (Article 21.42 of 1951 Texas Insurance Code). Quoted on page 4.

that insurance is commerce and that under the U. S. Constitution a State is prohibited from regulating companies engaged in interstate commerce. This Court, however, has repeatedly held that as between the assured and the insurance company the issuing of insurance is not a transaction of commerce but a simple contract of indemnity and like other personal contracts they are local transactions and are governed by local law. Insurance is not a commodity, it is a personal service.⁸

(b) POLICE POWER OF THE STATES V. MARITIME LAW

In *Osborn v. Ozlin* (1939), 310 U.S. 53, 65, 66, this Court held:

"Government has always had a special relationship to insurance. The ways of safeguarding against untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The State * * * may curtail drastically the area of free contract, * * *."

⁸ *Paul v. Virginia* (1868), 8 Wall. (75 U.S.) 168; *Hooper v. California* (1895), 155 U.S. 648; *New York Life Insurance Company v. Cravens* (1900), 178 U.S. 389; *New York Life Insurance v. Deer Lodge County* (1913), 231 U.S. 495; *United States v. Southeastern Underwriters Association* (1944), 322 U.S. 533; *Robertson v. California* (1946), 328 U.S. 440; *Vance on Insurance* (3rd Edition 1951), pages 125-139. "*Rights of Foreign Insurers*" where the above cases are discussed. Also see a discussion of these cases at the *Joint Hearing Before Subcommittees of Committees on the Judiciary, 68th Congress on S 1362, HR 3269 and HR 3270, bills "To Affirm the Intent of Congress That the Regulation of the Business of Insurance Remain Within the Control of the Several States * * *"* (McCarran Act of 1945). Statement of Senator Bailey, pages 2 to 9, and statement of Hon. Francis Biddle, Attorney General of the United States, pages 29 to 35, 54, to the effect that the insurance companies are reversing their attack and fighting Federal regulation when heretofore they fought State regulation; that what the insurance companies really want is no regulation and that no Court has ever held that the power of interstate commerce excludes appropriate police powers of the State.

In order to eliminate State insurance regulations the respondent advocates that *Hooper v. California* (1895), 155 U.S. 648, a marine insurance case, be disregarded. This case held that State insurance regulations must be followed by foreign insurance companies authorized to do business within the State. As a substitute for the valid exercise of the police power by the State, respondent suggests that the terms of a marine insurance policy be governed solely and exclusively by general admiralty law. Since a national bill regulating marine insurance would be unconstitutional⁹ this would be equivalent to granting to marine insurance companies a blanket license to operate without legal restraint. The marine insurance business is too complex to be regulated by decisional law. Regulations as to available defenses must by necessity be handled by the legislative branch of the State governments so that the public interest is protected.¹⁰

The lower Court apparently takes the position that the general admiralty law overrides the above inherent police power of the several States on the grounds: first, that the marine insurance policy is a maritime contract¹¹ and therefore all terms or defenses to the policy must be governed exclusively by general admiralty law. Second, that all State

⁹ Congressional Record, 67th Congress, Vol. 62—Part III, pages 2521 and 2522, Debate on Bill S 2265.

¹⁰ Article X, Amendment to the United States Constitution. *United States v. South-Eastern Underwriters Ass'n.* (1944), 322 U.S. 533, 544; *Robertson v. California* (1946), 328 U.S. 440, 447.

¹¹ *De Lovio v. Bolt* (1815), 2 Gall 399, Fed. Case No. 3,776, and *New England Mutual Marine Ins. Co. v. Dunham* (1870), 11 Wall. (78 U.S. 1) held that a marine insurance policy is a maritime contract and within admiralty jurisdiction but these cases do not go so far as to outlaw State statutes regulating the terms and defenses available to foreign corporations doing business within the State.

statutes relating to a marine insurance policy are rendered inapplicable upon the authority of *Knickerbocker Ice Co. v. Stewart*¹² (1920), 253 U.S. 149; a tort case involving State Workman's Compensation Acts; and *Union Fish Co. v. Erickson*¹³ (1919), 248 U.S. 308; and *Just v. Chambers*¹⁴ (1941), 312 U.S. 383, a death claim involving a State survival statute. None of these cases involve a conflict between the police power of a State and admiralty law relating to maritime contracts. It is interesting to note that Justice Reynolds said in *Southern Pacific v. Jensen* (1917), 244 U.S. 205, 216:

"In view of these Constitutional provisions and the Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. That this may be done to some extent cannot be denied."

In the same case on page 228, Justice Pitney, referring to the Judicial Code (now 28 U.S.C. 1333) said:

¹² A companion case to *Southern Pacific v. Jensen* (1917), 244 U.S. 205.

¹³ Reliance on this case is obviously misplaced because there the State of California attempted to legislate in a field already taken over by Federal legislation. To-wit: laws relating to seamen contracts, whereas in the case at bar Congress has declined to legislate on insurance contracts. See *Red Cross Line v. Atlantic Fruit Co.* (1924), 264 U.S. 109, a contract case involving an arbitration clause in a charter party. State law prevailed.

¹⁴ A death claim which is supplementary to admiralty law. See *Western Fuel Co. v. Garcia*, 257 U.S. 233 at 242. "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of general maritime law, nor interfere with the proper harmony and uniformity of the law in its international and interstate relations."

"I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either Federal or State."

(c) THE JENSEN LINE OF CASES

The doctrine of the *Jensen* line of cases, which includes *Knickerbocker Ice Co.* case, has been questioned by this Court in *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 (1943) where an attempt was made to apply the *Jensen* doctrine to the field of unemployment insurance. The Court said:

"Indeed, the *Jensen case* has already been severely limited, and has no vitality beyond that which may continue as to State workman's compensation laws."

The *Jensen doctrine* permits matters of "local concern" to be regulated by State statutes.¹⁵ Since the early cases of *Paul v. Virginia* (1868), 8 Wall. (75 U.S. 168), and *Hooper v. California* (1895), 155 U.S. 648, 654, a marine insurance policy has been declared a local transaction or a matter of local concern. If an insurance policy is a local transaction under the commerce clause of the U. S. Constitution, Art. 1, Sec. 8, Cl. 3, as the last two cases clearly hold, then it would be inconsistent to rule that under Article III, Section 2 of the same Constitution the same insurance policy

¹⁵ *Miller Indemnity Underwriters v. Brand, et al.* (1926), 270 U.S. 59, 64. See *Cooley v. Board of Wardens of Philadelphia* (1851) (12 How.), 53 U.S. 299, and *The General Smith* (1819), 4 Wheat 438, 4 L. Ed. 609. The last two cases no doubt are the basis of the "local concern" exception to the *Jensen* line of cases. Also see *The Lottawana* (1874), 21 Wall. 88 U.S.) 558, 580, 581.

is not a local transaction and must be governed by admiralty law to the exclusion of State law. If the commerce and admiralty clause of the Constitution are both applicable to the field of marine insurance then the only way this Court can be consistent is to rule that the *Jensen* line of cases outlawing State law are inapplicable to a marine insurance policy. It would be far safer and infinitely more practical to follow the rationale in *Cooley v. Board of Wardens*, 53 U.S. 299 than attempt to apply the uniformity doctrine to a marine insurance policy.

(d) CHARACTERISTIC FEATURES OF ADMIRALTY LAW

In a Limitation of Liability Proceeding¹⁶ which is a characteristic feature of maritime law, the proceeds from a marine insurance policy cannot be reached by individuals having a claim against an offending vessel or her owner because an insurance policy has been held to be a personal contract.¹⁷ For the same reason a maritime lien-holder cannot reach marine insurance proceeds in event the vessel is destroyed and neither does a marine insurance contract import a maritime lien which is a characteristic feature of admiralty law.¹⁸ If a contract of marine insurance is so personal that it cannot be reached in admiralty litigation involving

¹⁶ 46 U.S.C. 181-189.

¹⁷ *Maryland Casualty Co. v. Cushing* (1954) —U.S.—, 98 L. Ed. 519, 1954 A.M.C. 837; *The City of Norwich* (1886), 118 U.S. 468.

¹⁸ *A. M. Bright Grocery Co. v. Lindsey* (1915), 225 Fed. 257, 261; also see *Insurance Co. of Pennsylvania v. Proceeds of the Sale of the Barge Waubanshene*, 24 F. 559 (1885, N.Y.), where the Court held that a policy of marine insurance on a vessel is not such a contract as to import a maritime lien. The insurance company could not collect marine insurance premiums by an "in rem" proceeding because a maritime lien does not extend to contracts which do not aid the vessel but are merely for the personal benefit of the owner.

characteristic features of maritime law then it would be inconsistent to rule that such a maritime contract is by itself a characteristic feature of admiralty and cannot be governed by State insurance statutes which regulate the issuing of this type of contract and the defenses thereto. Certainly, the Petitioners, who are groccrymen in a small town many miles removed from the sea, did not have in mind any characteristic features of maritime law when they entered into the contract in question. It is safer to assume that they bought this coverage with the Local Laws in mind.

Congress, in Public Law 162 (1922), defines marine insurance as follows:

"Marine insurance" means insurance against any and all kind of loss of or damage to vessels, craft, cars, aircraft, automobiles, and other vehicles, whether operated on or under water, land, or in the air, in any place or situation, and whether complete or in the process of or awaiting construction; also all goods, freights, cargoes, merchandise, effects, disbursements, profits, money, bullion, precious stones, securities, choses in action, evidences of debt, including money loaned on bottomry and respondentia, valuable papers, and all other kinds of property and interests, therein, including liabilities and liens of every description, in respect to any and all risks and perils while in the course of navigation, transit, travel, or transportation on or under the sea or other waters, on land or in the air or while in preparation for or while awaiting same or during any delays, storage, transshipment or reshipment incident thereto, including builder's risks, and any loss or damage to property or injury or death of any person, whether legal liability results therefrom or not, during awaiting or arising out of navigation, transit, travel or transportation, or the construction or repair of vessels; * * *." (District of Columbia Code, 1951 Edition, Title 35, Sec. 1101).

This Congressional definition sets up marine insurance as a multiple line insurance business. It is obvious that what is labelled marine insurance today would not necessarily come within the decision of *New England Mutual Marine Ins. Co. v. Dunham* (1870), 11 Wall (78 U.S.). So if a policy of marine insurance must be exclusively governed by maritime law to the exclusion of State insurance statutes then a large number of fringe and marginal insurance cases can be expected in all Federal Courts. If the laws of the 48 States relating to marine insurance are not uniform what will happen to uniformity when the various Federal Judges in this country rule on a marine policy and attempt to allocate common law and maritime law to an insurance contract in order to determine whether or not State insurance statutes are applicable. Suppose a sack of flour is sent from Kansas to Switzerland and is insured under a standard marine insurance cargo policy with a standard warehouse to warehouse clause in the contract. The flour is thus insured during land storage and transportation by rail, truck, airplane and ship. Suppose that the sack of flour is destroyed when a motor truck carrying this shipment is involved in an automobile collision on the Pennsylvania Turnpike. Would a controversy over an alleged breach of warranty be governed by maritime law, to the exclusion of all State laws? How much maritime flavor must a marine insurance policy have before it would work material prejudice to any characteristic feature of maritime law? Would the rule be different for cargo and for hull policies?

Whatever characteristic features of admiralty law are involved in the controversy between petitioners and respondent concerning the common law chattel mortgages and the warranty of use, it must be conceded that they involve as

much of a characteristic of common law as of admiralty law. We are not dealing here with the construction of a perils of the sea clause, or an Inchmaree clause, or a marine watchman clause¹⁹ but rather with the validity of State insurance statutes regulating defenses that an admitted foreign insurance company cannot use in order to escape contractual liability. Under the circumstances serious consideration should be given to the observation made by Justice Holmes in the *Jensen* case:

"If admiralty adopts common law rules without an act of Congress, it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law of a State. For, from the often repeated statement that there is no common law of the United States * * * the natural inference is that, in the silence of Congress, this Court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State. * * * Even where the admiralty has unquestioned jurisdiction the common law may have concurrent power * * *. The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; * * *.

"* * * It is too late to say that the mere silence of Congress excludes the statute or common law of a state from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect."²⁰

¹⁹ *Aetna Ins. Co. v. Houston Oil & Transport Co.* (5 Cir. 1931), 49 F. 2d 121, Cert. Den. 284 U.S. 628.

²⁰ *Southern Pacific v. Jensen* (1917), 244 U.S. 205, 221, 222. Also note dissenting opinion of Justice Pitney (pgs. 226, 227). He in

(e) HISTORICAL SKETCH OF MARINE INSURANCE ²¹

When marine insurance was first conceived it was an accepted rule that it had to be regulated by a governing body. At first the business was controlled by groups of merchants and then at the local level by municipal regulation. The local law became known as "law merchant". These laws form the foundation of our present concepts of all property insurance, marine and otherwise. When England grew to be a leading commercial nation she used marine insurance to foster her commerce and develop other branches of insurance. On the other hand marine insurance business in the United States developed out of the fire insurance business which has always been regulated by the several states. It is significant that in this country today fire insurance companies control the marine insurance business and that is why we find fire policy restrictions in marine insurance policies. These fire policy restrictions became so comprehensive that the states had to regulate the terms of fire insurance policies and finally establish statutory forms. In the marine business there are no statutory forms of insurance and underwriters mold the terms and conditions of the policy to fit the unregulated rates or vice versa.

The regulation of the marine insurance business by the judiciary was never looked upon with favor. Controversies over marine insurance policies were purposely kept out of the early English courts, and were handled by committees

effect says that if the States have concurrent jurisdiction—and they have over a marine insurance policy—then in the absence of legislation by Congress—concerning the terms and conditions in a marine insurance policy—the States are at liberty to administer their own laws when exercising concurrent jurisdiction with admiralty and are at liberty to change those laws by statute.

²¹ Winter on Marine Insurance, 1952, Third Edition, 1 to 32.

made up of merchants familiar with marine risks and shipping. The jealousy of the early common law courts and admiralty courts of England was so great that insurance matters were finally removed from both courts and referred to a special insurance court.²² As the insurance business developed in England, Parliament took over the regulation of the business and today British marine insurance business is regulated and governed by the *Marine Insurance Act*, 1906.²³ On the other hand, Congress has consistently declined to regulate any type of insurance business and by the *McCarran Act* declared that it is the policy of the United States government to leave the regulation of insurance to the States. An examination of the history of this Act reveals the fact that this Court set the pattern for the *McCarran Act* by its decisions in *Paul v. Virginia* (1868), 75 U.S. 168 and *Hooper v. California* (1895), 155 U.S. 648.

Point II

Congress has declared that the Marine Insurance business shall be governed by State Laws.

(a) THE MODEL MARINE INSURANCE ACT PASSED BY CONGRESS IN 1922

For three years, 1919-1922, the marine insurance business was investigated from top to bottom by government experts, and by the House Committee on Merchant Marine & Fisheries and the Senate Committee on Commerce. As a result of this extensive study it was concluded that the States had the right to control and regulate the marine insurance business and that the only way to secure uniform

²² Vance on Insurance, 1951 Edition, pp. 11 to 20.

²³ A copy of the Act is set out in Arnould on Marine Insurance, 3rd Edition (1950), Vol. 2, pages 1202-1227.

marine insurance regulations was for Congress to set up a model code of marine insurance law for the District of Columbia in the hopes that all other States would copy this code.²⁴

At a Senate hearing on S. 210, a bill "*To Regulate Insurance in the District of Columbia, and for other Purposes*", Senator Nelson asked Mr. Rush, president of Insurance Company of North America, whether or not it would be possible for Congress to enact a law governing strictly marine insurance in view of the recent Supreme Court decisions.²⁵ Mr. Rush answered that it would require a constitutional amendment to pass a federal insurance act regulating the marine insurance business.²⁶ The general counsel for the marine underwriters stated on page 158 of the same hearing:

"That as you cannot constitutionally legislate on a national bill which would override and control all such matters within the States you do the next best thing to it, namely; set an example within the territorial sphere where your will is supreme; and by so doing you blaze the way; that to use perhaps a more maritime term, you lay the buoys which should mark the channel to a proper method to that which is in its nature an international transaction, and therefore you teach the States what they should follow. If the proper note is sounded, if the proper example is set in Washington by you

²⁴ 62 Congressional Record, pp. 2521, 2522, 67 Cong., 2nd Session (1922).

²⁵ The Senator no doubt referred to the then recent decision of *Southern Pacific v. Jensen* (1917), 244 U.S. 205, and *Knickerbocker Ice Co. v. Stewart* (1920), 253 U.S. 149.

²⁶ Page 140 of *Hearings before the Senate Committee on Commerce, 67th Congress (1921) on S. 210, a bill "To Regulate Marine Insurance in the District of Columbia and for other Purposes."*

gentlemen, the States are a hundred times more inclined to follow that example, to fall in line, and say 'This is a matter which we have looked at too long and too narrowly'."

Counsel for the marine underwriters explained that he relied upon *Hooper v. California* (1894), 155 U.S. 648 and other Supreme Court decisions cited to support the above statement.²⁷

The Model Marine Insurance Act (S. 210) became law in 1922.²⁸ By agreement between the underwriters and steamship owners, Section 20, of the proposed bill (S. 210) relating to "just enforcement of policy forms and conditions; the formulation and enforcement of uniform, efficient and economical practices * * *" by insurance groups organized for "concerted action" was deleted from the bill. It was then argued that there cannot be uniform terms and conditions in a marine insurance policy because these are the competitive elements of the business.²⁹

(b) THE MERCHANT MARINE ACT OF 1920

Prior to the enactment of The Model Insurance Code, Congress enacted a law declaring that Federal antitrust laws

²⁷ Pages 154 and 155 of Senate Hearing cited in footnote 26. The other decisions are: *Allgeyer v. Louisiana*, 165 U.S. 578 (1896); *Nutting v. Massachusetts*, 183 U.S. 553 (1901); *Thames & Mersey v. U. S.*, 237 U.S. 19 (1914); *Peck & Co. (Inc.) v. Lowe*, 247 U.S. 165 (1917).

²⁸ 62 Congressional Record, 67th Congress, 2nd Session, page 3408, Public Law 162 of Mar. 4, 1922, 42 Stat. 408, ch. 93, title 5 & 15. Also see District of Columbia Code, 1951 Edition, Title 35, Section 1101-1134.

²⁹ Statement of Ira Campbell, General Counsel for Steamship owners, pages 76 and 77 of Senate Hearing referred to in footnote 26.

would not apply to the marine insurance business³⁰. With the aid of the Federal government, marine insurance syndicates were established so that we could compete with the foreign marine insurance market.³¹

(c) THE McCARRAN ACT

It may be illuminating to know that the Attorney General of the United States, on October 20, 1943, many months prior to this Court's decision in the *Southeastern Underwriter's* case,³² requested the Joint Committee of Congress considering the *McCarran Act*, to leave his department alone in the *Southeastern Underwriter's* case because " * * * it would be a little more sporting to let the Supreme Court decide the questions of law and then determine the policy of Congress".³³ Based on the Transcript of the Joint Hear-

³⁰ Merchant Marine Act of 1920, 46 U.S.C. 885 (b) "Nothing contained in the 'anti-trust laws' as designated in Section 12 of Chapter 1 of Title 15, shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risk undertaken by such association or any of the component members."

³¹ Statement of Professor S. S. Huebner, pages 16 and 17 of the Senate Hearing referred to in footnote 26. Syndicates were formed to insure the hulls of ocean going vessels only. The insurance on the *WANDERER* comes within the inland marine insurance classification and that classification is further broken down into "dry" and "wet."

³² *United States v. South-Eastern Underwriters Ass'n.* (1944), 322 U.S. 533.

³³ Pages 59 and 60—*Joint Hearings before Subcommittees of the Committees on the Judiciary*, 78th Congress, 1st Session, on S. 1362, H.R. 3269, and H.R. 3270, "Bills to Affirm the Intent of Congress that the Regulation of the Business of Insurance Remain within the Control of the Several States and that the Acts of July 2, 1890 and October 15, 1914, as amended, be not Applicable to That Business."

ings it would be erroneous to state that the *McCarran Act* was passed because of the Supreme Court decision in the *Southeastern* case. It would almost seem that the reverse was true. When the Joint Hearings began on October 20, 1943, Senator Bailey, a co-sponsor of the *McCarran Act* made the following statement:³⁴

"More is involved than the pending litigation. It is relevant only as informing us that the national policy is involved. The Congress may at any time or under any circumstances declare what that policy is or is intended to be. The Courts interpret laws and determine rights in controversy; the Congress enacts laws, declares and determines public policy. It is the duty of the executive branch to follow that policy as determined by Congress. If any department or bureau of the Government undertakes to determine public policy by judicial process, or judicial definition or administrative regulation, the Congress has the prior right to preserve and the duty of preserving the public policy, of which it is the creator and guardian, by plain and timely declaration. This is no interference with judicial process but affirmative exercise of the true function of the Congress. What we have to deal with is the proposition to declare insurance to be commerce and thus authorize Federal control in place of State control, and also that Congress shall substitute a Federal system for supervision of insurance for the long established State systems.

"There is no twilight zone or no man's land here:³⁵

³⁴ Pages 2 and 3—Same as preceding footnote.

³⁵ No doubt referring to *Davis v. Department of Labor and Industries of Washington* (1942), 317 U.S. 249, where the "Twilight Zone" doctrine was adopted and where this Court said: "Too much has happened in the twenty-five years since that ill starred decision (*Jensen* case). Federal and State enactments have so accommodated themselves to the complexity, and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which judicial process itself brought into being."

Either the Congress would take over the regulation of fire insurance or it would be left to the States; and if fire insurance is commerce among the States, there is no room for doubt as to the instant effect: The States will be eliminated from a field of far-reaching importance to their citizens, to their revenue and their powers and a business of the utmost importance to millions of the population as policyholders, which has been built up into a great and necessary relationship and usefulness under State regulation, which has served and grown admirably under State systems of supervision, would be torn from the system to which it, the people and the States have become adapted, and taken over by a Federal Bureau—a far-reaching step in unnecessary centralization. One hesitates to contemplate the consequence; no one can foresee the extent of the disruption, the confusion; nor may one say into what sort of circumstances one of the universal activities of the American people would be cast—without sound reason or any justification in necessity or prospect of improvement.

“Manifestly more than the application of the antitrust laws is involved. Manifestly more than the Georgia district court case is involved. We stand here not only upon the threshold of a public policy involving not only the whole field of a great financial activity of the utmost value and usefulness to the people but also at the doors of every legislative hall in every State, proposing to take from them a function under their inherent police powers, which, so far as I know, no one challenges their competence to perform after more than a century of beneficent experience.”

The above statement of Senator Bailey together with this Court's decision in the *South-Eastern Underwriter's* case and subsequent cases,³⁰ leaves little doubt that the rule of

³⁰ *South-Eastern Underwriters*, 322 U.S. 533; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 316; *Robertson v. California*, 328 U.S. 443.

Hooper v. California, is still applicable to a marine insurance policy ³⁷ and that the *McCarran Act* has made the Texas statutes, herein referred to, a part of the marine insurance contract now being considered. The Texas statutes are as much a part of this contract as if the parties had copied them in full as part of the conditions of the policy and any terms placed in the contract by respondent which are in conflict with the Texas statutes are null and void.³⁸

Point III

The fact that the Wilburn brothers transferred the *Wanderer* from their partnership to their corporation without Respondents approval cannot support a forfeiture of the policy because there is no proof that there was a change of their insurable interest in their vessel.

³⁷ *Hooper v. California*, 155 U.S. 648, 655. "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they are formed for the purpose of doing a fire or a marine business. * * * And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation. * * * The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

³⁸ *Vance on Insurance*, Third Edition (1951), page 279. Also see *Camden Fire Insurance Co. v. Clayton*, 6 S.W. 2d 1029, 1030 (1928, Tex. Sup. Ct.), and *New York Life Ins. Co. v. Cravens* (1900), 178 U.S. 389. "Foreign corporations which do business in a State do so, not by right but by grace and must in so doing conform to its laws; they cannot avail themselves of the benefits without bearing its burdens."

This point was not raised in the petition for certiorari because it involves principles of common law and not admiralty law but in order that a complete determination of the facts relating to alleged breach of warranties may be made this point is presented.

Volume 29, *American Jurisprudence* 505, Section 630, states the applicable rule in these words:

"Generally any material change of title, although not by alienation, will avoid an insurance contract which provides that any change in title shall avoid it; but if the real ownership remains the same, although there is a change in the evidence of title, such change being merely nominal, and not of a nature calculated to diminish the motives of the insured to guard it from loss, the policy is not violated."

Each of the three Wilburn brothers originally purchased an undivided one-third interest in the WANDERER and when they lost their vessel each of them still had an undivided one-third interest in the vessel because they each owned one-third of the stock of their corporation. The name of their corporation was the same as the name of their partnership. The act of changing their partnership into a corporation was merely incidental to the coverage involved and was not of a nature calculated to diminish their motive to guard the WANDERER against loss. The burden of proving that this was not the case rested upon the respondent. There is no proof that the *insurable interest* of the Wilburn brothers changed because the actual facts would not support such proof. (Appendix B)

Courts will construe the terms of a marine insurance policy to avoid forfeiture if it is possible to do so, and if necessary lift the corporate veil to preserve the right of aggrieved as-

sureds. Here the named assureds are the three Wilburn brothers doing business as Wilburn Boat Company. There is no restriction in the policy that the three brothers must conduct their business as a partnership or as a corporation, so it is only fair to conclude that any ambiguity in this respect must be resolved in favor of the assured.³⁹

G.

Conclusion

It has been pointed out that this Court has consistently held that an insurance policy is not a commodity but a personal service and that the commerce clause of the U. S. Constitution does not apply to a marine insurance policy because it involves a personal transaction. That being the case, the States have the power to admit foreign insurance companies desiring to do business within the State under the conditions imposed by the insurance statutes of the State. It was further pointed out that the general police powers given to the States take precedence over general maritime law because the issuance of a marine insurance policy is a matter of local concern. There are no characteristic features of maritime law involved in reference to a common law mortgage or a continuing warranty of use.

The *McCarran Act* declares the policy of the Federal government in plain, unequivocal terms, and the fact that the marine insurance associations mentioned in the Merchant Marine Act of 1920 were included in the *McCarran*

³⁹ See *Thompson v. Phenix Insurance Company of Brooklyn* (1890), 138 U.S. 287, involving a successor receiver and an alleged change of title. The Court held: "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured."

Act is a clear indication that marine insurance business comes within the scope of the latter act.

Marine insurance today is a multiple line business and any attempt by the judiciary to regulate the terms of multiple line marine insurance policies would create such confusion that the resources of adjudication would complicate an already complex business to the point where our economy would suffer a serious set-back. The various States in the Union have successfully regulated the marine insurance business, as well as all other types of insurance business, throughout the history of our country and the fact that today our marine insurance business is prospering as it has never prospered before should be a persuasive force in determining the applicability of State regulation to marine insurance. An established system of State regulation worked successfully for over a century and should not at this time be overthrown by the questionable doctrine of the *Jensen* and *Knickerbocher* decisions.

Respectfully submitted,

HOBERT PRICE,
Attorney for Petitioners,
 761 San Jacinto Bldg.,
 Houston 2, Texas

ALEXANDER GULLETT,
Of Counsel;
 T. G. SCHIRMAYER,
 Submitted Brief for
 Petitioners

APPENDIX A

Certificate No. 2213

Company No. D 313

**BOARD OF INSURANCE COMMISSIONERS
of the
STATE OF TEXAS****THIS IS TO CERTIFY THAT****FIREMAN'S FUND INSURANCE COMPANY****San Francisco, California**

has, according to sworn statement, complied with all requirements applicable thereto and is hereby authorized to pursue the business of

Fire; Marine; Lightning; Tornado; Auto; Riot and Civil Commotion; Explosion; Earthquake; Accident; Health; Plate Glass; Liability; Workmen's Compensation; Common Carrier Liability; Boiler and Machinery; Burglary; Theft and Larceny; Sprinkler; Team and Vehicle; Automobile and Aircraft; Property Damage and Collision

insurance within this State for year ending May 31, 1949, in accordance with provisions of Chapters 11 and 18, Title 78, R. C. S., Texas, 1925.

**IN WITNESS WHEREOF, I hereunto sign
my name and affix my official seal at
Austin, Texas, this 19th day of April,
1948.**

(SEAL)

**s/ GEORGE B. BUTLER,
Chairman of the Board**

APPENDIX B

STATE OF TEXAS §
 § ss.
 COUNTY OF GRAYSON §

AFFIDAVIT

Glenn Wilburn, Frank Wilburn, and Henry Wilburn being duly sworn on oath depose and say that they are the incorporators and sole stockholders of Wilburn Boat Company and are the same individuals as L. G. Wilburn, J. F. Wilburn and J. H. Wilburn, mentioned in the articles of incorporation of Wilburn Boat Company; that when the Motorboat WANDERER became a total loss they each owned one-third (1/3) of the stock of said corporation and that their interest in the WANDERER did not change during the period of time beginning June 7, 1948, the date they acquired said inland craft, to the day it became a total loss on February 25, 1949.

(s) GLENN WILBURN

Glenn Wilburn

(s) FRANK WILBURN

Frank Wilburn

(s) HENRY WILBURN

Henry Wilburn

Sworn to and subscribed before me this 19th day of July
 A.D. 1954.

(Seal)

(s) JAMES P. RILEY

Notary Public, Grayson
 County, Texas

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SEP 16 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~1000~~ ~~1001~~ ~~1002~~ ~~1003~~ ~~1004~~ ~~1005~~ ~~1006~~ ~~1007~~ ~~1008~~ ~~1009~~ ~~1010~~ ~~1011~~ ~~1012~~ ~~1013~~ ~~1014~~ ~~1015~~ ~~1016~~ ~~1017~~ ~~1018~~ ~~1019~~ ~~1020~~ ~~1021~~ ~~1022~~ ~~1023~~ ~~1024~~ ~~1025~~ ~~1026~~ ~~1027~~ ~~1028~~ ~~1029~~ ~~1030~~ ~~1031~~ ~~1032~~ ~~1033~~ ~~1034~~ ~~1035~~ ~~1036~~ ~~1037~~ ~~1038~~ ~~1039~~ ~~1040~~ ~~1041~~ ~~1042~~ ~~1043~~ ~~1044~~ ~~1045~~ ~~1046~~ ~~1047~~ ~~1048~~ ~~1049~~ ~~1050~~ ~~1051~~ ~~1052~~ ~~1053~~ ~~1054~~ ~~1055~~ ~~1056~~ ~~1057~~ ~~1058~~ ~~1059~~ ~~1060~~ ~~1061~~ ~~1062~~ ~~1063~~ ~~1064~~ ~~1065~~ ~~1066~~ ~~1067~~ ~~1068~~ ~~1069~~ ~~1070~~ ~~1071~~ ~~1072~~ ~~1073~~ ~~1074~~ ~~1075~~ ~~1076~~ ~~1077~~ ~~1078~~ ~~1079~~ ~~1080~~ ~~1081~~ ~~1082~~ ~~1083~~ ~~1084~~ ~~1085~~ ~~1086~~ ~~1087~~ ~~1088~~ ~~1089~~ ~~1090~~ ~~1091~~ ~~1092~~ ~~1093~~ ~~1094~~ ~~1095~~ ~~1096~~ ~~1097~~ ~~1098~~ ~~1099~~ ~~1100~~ ~~1101~~ ~~1102~~ ~~1103~~ ~~1104~~ ~~1105~~ ~~1106~~ ~~1107~~ ~~1108~~ ~~1109~~ 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I.

Under the due process clause of the XIVth Amendment to the Federal Constitution, by which no state can give its legislation extra-territorial effect, the only question brought forward by this Petition, namely, a supposed conflict between the general admiralty or maritime law and the Texas law, cannot arise as to this contract—which was made in Illinois. No question of conflict between the general admiralty or maritime law, and the Illinois law, is brought forward; no claim is made that there is any such conflict, or that Illinois law, any more than the maritime law, would permit recovery in the teeth of the terms of the contract. The Petition here brings forward and argues only the moot question of a supposed conflict between the general maritime law and Texas law. We do not understand that certiorari will be granted to consider arguments addressed to a moot question, especially when Petitioners, by incorrect statements of the record, carefully avoid raising the only question that could give those arguments relevance to the correctness of the judgment of dismissal 29

II.

This Maritime Contract was governed by Uniform Admiralty or Maritime Law. These Petitioners admitted on brief before the Court of Appeals that the McCarran Act was intended only to undo the effect of the Southeastern Underwriters case. It was so intended; and should be so construed, in view of its language, legislative history, and the construction hitherto given it, especially as it would be void insofar as construed to destroy the national uniformity of the maritime law that governs marine insurance 32

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No. 758

THE WANDERER

WILBURN BOAT COMPANY, et al.,
Petitioners-Appellants Below,
vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent-Appellee Below.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

STATEMENT

We are unable to accept Petitioners' statement of the case.

At the trial Petitioners stipulated that they broke this insurance contract in numerous ways; broke it, moreover, in respect of matters as to which the contract provided in downright terms that a breach rendered the policy void.

In view of their numerous stipulated breaches Petitioners were barred from recovery under any law—whether the

law of Illinois where the contract was made and delivered, or the law of Texas which they do not state correctly, or the law of Oklahoma where the owner of the vessel resided at the time of the loss and where the loss occurred, or the general maritime law with reference to which this contract was obviously made—and necessarily made, since this Court and the other Federal Courts have held many times in a long line of unbroken decisions that the general maritime law must govern this typical maritime contract of marine insurance on the hull of a navigating vessel.

Following the decisions last referred to, the Court of Appeals said: "Therefore the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by the Texas courts have no application to the present situation."

The way Petitioners seek to take advantage of this entirely correct statement is illustrated by their treatment of their breach of the policy in selling their owners' interest in the insured vessel.

The policy provision is, that sale of the assured interest rendered the insurance void; the stipulated fact is that the individuals to whom the policy ran did sell the vessel—to an Oklahoma corporation for \$9000.00 (R. 77); the concurrent findings of the District Court and the Court of Appeals are that this was a breach of the policy. (R. 33, 281.)

There is no state law outlawing policy conditions against sale of assureds' interest in the property. But Petitioners seek to brush this aside with the remark (Petition, p. 8) that "The question of whether this transfer of the vessel constitutes a breach of warranty is not presented to this Court because it involves points of law not ruled on by the Lower Courts." The point of law argued by Peti-

tioners to the "Lower Courts" in connection with this stipulated breach is that a Texas statute (quoted in their Petition at page 8) says that no breach shall be a defense that does not contribute to the loss, and the sale did not of itself contribute to the loss. Of course there is an entire absence of any tenable theory that would make Texas law (rather than Illinois or Oklahoma law—to say nothing of general maritime law) govern the validity and effect of the terms of this contract. But beyond that, the Texas statute so referred to has been construed by the Texas courts to have no application whatever to policy terms of this nature, whose breach *could* not of itself contribute to the destruction of the property by fire.*

For that very reason, the Texas courts hold that when the Texas Legislature forbade defense on the basis of a provision whose breach did not contribute to the loss, it did not have in contemplation such provisions as this, whose breach could not of itself contribute to the loss. This distinction is illustrated by the case of *Home Insurance Co. of New York v. Henderson*, 263 S. W. 650 (Tex. Civ. App.), where the insured purchased a car, paying half the price in cash, and signed 10 notes for the balance. He took out a fire policy with the insurer, providing if any note was not paid within ten days after maturity, the fire policy was null and void. At the time the car was destroyed by fire, two of the notes were over a month due. The Texas statute similar to the present Article 4930 (Texas Ins. Code, 1951, Sec. 6.14) was relied on by the insured when the insurer defended on the policy provision. The Court said:

"It is believed that Article 4874A [the present Article 4930] does not have application to the provision in the suit, since the subject-matter of such stipulation, from its very nature could not *of itself* contribute to

* The provision goes to moral risk (White Dep. 10) like the provision against pledging the vessel. (See *Sun Insurance Office v. Scott*, 284 U. S. 177.)

bring about the destruction of the property by fire. As frequently held, Article 4874A has reference only to those warranties and provisions, the breach of which might contribute to or bring about a fire loss, and has no application to provisions, the violation of which could not from their very nature, contribute to or bring about the destruction of property by fire." (Our emphasis) *Ibid*, 652

This ruling has been followed many times in construing this statute and is a well developed distinction to which the Texas courts adhere. (See 24 Texas Jurisprudence 906.) Among the many instances where it has been held that the statute does not apply are: requirements of keeping records in an iron safe, *Commonwealth Ins. Co. v. Finegold* (Tex. Civ. App.), 183 S. W. 833; clause prohibiting concurrent or additional insurance, *Boatner v. Providence-Washington Ins. Co.* (Tex. Com. App.), 241 S. W. 136; requirement that the insured be the sole and unconditional owner of the property, *National Fire Ins. Co. v. Carter* (Tex. Com. App.), 237 S. W. 1089; provision requiring insured to submit to examination after the fire loss, *Humphrey v. National Fire Ins. Co.* (Tex. Com. App.), 231 S. W. 750; and requirement of the insured to submit a notary's statement as proof of loss, *Springfield Fire and M. Ins. Co. v. Nelms*, 184 S. W. 1094 (Tex. Civ. App.).

Accordingly, the Texas statute on which Petitioners rely, as construed by the Texas courts, leaves the policy provision against sale in full force and effect, and its stipulated breach is a complete defense, even *under the Texas law*.

This is only one example. Full appreciation of the effect of Petitioners' stipulated violations of their contract requires full and accurate statement of the case, which follows. Full and correct statement of the case also solves the only suggestion ultimately raised here by this Petition, involving choice of applicable law, a matter that the Petition treats upon an incorrect and misleading statement of

the case and of the authorities, and which appears to be a singularly barren inquiry in any event since the judgment of dismissal was necessary under any law that might be thought to apply.

This suit was brought on a policy of insurance on a pleasure yacht named "The Wanderer." (Plaintiff's Exh. 1; White Dep. 7, 9, 14.)¹ She was 65 feet in overall length and 17 feet in the beam. (R. 72.)

The policy, No. YA 28579, had been issued in Chicago, Illinois, by defendant Fireman's Fund Insurance Company naming the then owners, Messrs. Marshall and Shuler, of Rock Island, Illinois, as assured. (R. 233-254.) H. H. Cleaveland Agency, an Illinois brokerage house of Rock Island, Illinois, had secured this policy for Marshall and Shuler from defendant, the insurer or underwriter therein. (H. H. Cleaveland Agency was not an insurer or underwriter.) (White Dep., 11.)

On June 9, 1948, while the vessel lay in the harbor at Greenville, Mississippi, under a port risk endorsement² she was purchased from Marshall and Shuler by three individuals, J. F. Wilburn (Frank Wilburn), J. H. Wilburn (Henry Wilburn) and L. G. Wilburn (Glen Wilburn). (R. 43, 70, 92.) They "elected" one McKinney of Denison, Texas, to secure insurance on the vessel for them. (R. 105, 118.) It was the Wilburns who asked him to get insurance, not vice versa. (R. 106.) McKinney had no facilities for procuring vessel insurance. (White Dep. 4.) He telephoned

¹ The *depositions* will be thus referred to herein. They were before the Court of Appeals in specie, and we have caused them, pursuant to stipulation on file herein, to be filed here. See R. 157-171 for rulings on objections to portions of the depositions. No question of the correctness of these rulings was raised by Petitioners in the Court of Appeals, and none is brought forward here.

² Port risk endorsement: See R. 243-244, and *Robinson v. Home Ins. Co.*, 73 F. (2d) 3 (CCA 5, 1934); cert. den. 294 U. S. 712.

H. H. Cleaveland Agency in Rock Island, Illinois, asking it to contact the insurance carrier (the defendant) to continue the existing insurance for the new owners, stating that this yacht would make a voyage from Greenville, Mississippi, to Lake Texoma via the Mississippi and Red Rivers and thereafter be used on Lake Texoma, requiring coverage of navigating perils. (White Dep. 4; Rossow Dep. 6.)³ H. H. Cleaveland Agency of Rock Island, Illinois, then communicated with this defendant at its office in Chicago, Illinois, by telephone, mail, and personal visit, conveying to defendant the above oral application, which defendant at said Chicago office accepted (R. 226; White Dep. 13, Rossow Dep. 6) and bound the risk. (See *Insurance Co. v. Midwest Transfer Co. of Illinois*, 178 F.(2d) 191 (CA 7, 1949).) Defendant then prepared the necessary endorsement for the policy at its office in Chicago, Illinois (R. 226; White Dep. 13, Rossow Dep. 6) and, in Chicago, mailed the same to H. H. Cleaveland Agency in Rock Island, Illinois, which countersigned it (R. 232) as issuing agent (R. 254) and then mailed the same to McKinney. (Rossow Dep. Exh. 7.) H. H. Cleaveland Agency of Rock Island, Illinois, also mailed to McKinney the original policy, No. YA 28579, to which said endorsement appertained. (Rossow Dep. Exh. 9.)

All subsequent endorsements followed the same course.

On December 14, 1948, Petitioners, through McKinney and H. H. Cleaveland Agency solicited an endorsement increasing the coverage from its original amount of \$10,000.00 by \$30,000.00, to a total of \$40,000.00, upon McKinney's representation by letter to Cleaveland in Rock Island, read over the telephone by it to defendant in Chicago (Dep. Rossow 29-30, Ex. 23) that "insured has an investment of \$40,000 in this yacht at the present time."

³ He also stated that it would be "locked" through the Denison Dam. (White Dep. 4, Rossow Dep. Exh. 2.)

(Dep. Rossow 29-30.)⁴ Again there was no mention that the yacht was being used for commercial purposes or mortgaged and none that it had been sold to a corporation. (Dep. Rossow 43.)⁵ Cleaveland from Rock Island called defendant in Chicago and, reading to defendant McKinney's letter stating that assured had an investment of \$40,000 in the vessel, secured thereby defendant's oral binder of the increased amount on December 20, 1948, which defendant confirmed to H. H. Cleaveland Agency in writing on December 28, 1948. (Dep. Rossow 30, Ex. 29.) Pursuant thereto on December 20, 1948 defendant in Chicago, Illinois, had prepared an endorsement for the policy increasing the amount of insurance under the policy to \$40,000 and on January 18 mailed it to Cleaveland, which in turn mailed it to McKinney. (R. 299, Dep. Rossow, Exs. 32, 33.)

Thus this contract (maritime or not) was completed and issued in Illinois, and the written evidence of the contract was delivered when it was put in the mails in Illinois. (See *Wenz v. Business Men's Accident Ass'n.*, 212 Ill. App. 581, 584; *Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25, 35;

⁴ This representation is now admitted to have been false. (Cf. *infra*.) Petitioners are bound by the false representations of their broker; *Eagle Star, etc., v. Tadlock*, 22 F. Supp. 545 (S.D. Cal. 1938) on 548, collects authorities. For repetition of this false statement by assureds, cf. *infra*.

⁵ It does not appear that even McKinney knew of the mortgages. This policy makes either concealment or misrepresentation a fatal breach; these are separate conditions. *Imperial Fire Ins. Co. v. Coas County*, 151 U. S. 452.

57 S. W. 635, 638; *Jackson v. New York Life Ins. Co.*, 7 F. (2d) 31, 32 (CA 9, 1929) and *cas. cit.*)⁶

Plaintiffs alleged flatly in the pleadings on which the case was tried that they had "duly complied with all the provisions of said policy" etc. (R. 9.)

Defendant denied this, specifying provisions breached. (R. 22-30.)

There were pretrial proceedings. (R. 118.)

At the commencement of the trial plaintiffs' counsel was asked if he desired to make an opening statement, and replied that "The pleadings speak for themselves so far as we are concerned." (R. 86.)

Plaintiffs went to trial on the simple issue of their performance *vel non*. (Complaint, R. 8, et seq.; Answer, R. 22,

⁶ "The general rule is that the acceptance of the application and the issuance and mailing of the policy are all the acts that are essential to put the contract in force, and the fact that the policy is sent to an agent for unconditional delivery does not alter the effect of the transaction. *Shattuck v. Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715."

Fidelity Mutual Life Assn. v. Harris, 94 Texas 25, 57 S. W. 635, 639.

"A policy of insurance is delivered to insured when it is deposited in the mails," etc.

Jackson v. New York Life Ins. Co., 7 F. (2d) 31, 32, (CA 9, 1925.)

"If the insurer in such a case does not contemplate any further action than the delivery of the policy by the agent, then the delivery becomes effective as soon as the policy is mailed." (C't. auth.)

Wenz v. Business Men's Accident Assn. of America, 212 Ill. App. 581, 583-584.

There is no argument that the law of Illinois would condone plaintiff's admitted breaches, nor would it; *vide infra*.

Contrary to the impression that the Petition labors to convey, it is apparent that defendant never solicited this policy, but that the Wilburns sought out this defendant on the marine insurance market in Chicago, themselves soliciting there a policy of marine insurance on the vessel they had bought in Mississippi.

et seq.) That is the issue here. Before the Court of Appeals Petitioners made an argument of waiver as to one, only, of the numerous breaches of the contract, which the Court of Appeals decided against them (R. 281) and they do not raise the question here.

At the trial Petitioners stipulated that they had breached provisions of the policy pointed out in the answer (R. 40, et seq.).

This insurance contract expressly provides:

"WARRANTED by the assured that the within named vessel shall be used *solely* for private pleasure purposes during the currency of this policy and shall not be hired or chartered *unless permission is granted by indorsement hereon.*" (Our emphasis) (R. 236.)

Petitioners stipulated (R. 40-41):

"It is stipulated between the parties that the Boat Wanderer was not used solely for private pleasure purposes during its ownership from time to time by the several plaintiffs herein, but on the contrary said boat was purchased with the intention of being chartered and used for hire, was remodeled and reequipped for such purposes, and to the extent that patronage was available, was chartered and used for hire from the time of its acquisition by J. F., J. H., and L. G. Wilburn until it sank as the result of being burned by fire on February 25, 1949. During January, 1949, the boat was damaged as the result of a storm. It was taken from its regular mooring at Burns Run Resort to Lake Texoma Boat and Dock Company for repairs and remained at Lake Texoma Boat and Dock Company undergoing repairs until three or four days before February 25, 1949, at which time it was returned to its regular mooring at Burns Run Resort. After being so returned to Burns Run Resort the boat was not thereafter used for any purpose until it sank as the result of being burned by fire on February 25, 1949."

The insurance contract further expressly provides (R. 241):

“It is Also Agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be *sold*, assigned, transferred or *pledged* without *the previous consent in writing of the Assurers.*” (Our emphasis)

Petitioners *stipulated* at the trial that the Wilburn Brothers sold “The Wanderer” to an Oklahoma corporation on September 24, 1948 for \$9,000.00. (R. 43, 76.) No previous consent, no written consent, and no consent whatever, was asked or given to this sale. There is no such argument.

The names of these assureds were first given by McKinney as Frank and Henry Wilburn d/b/a Wilburn Bros. and the endorsement of July 9, 1948, so reads. (R. 231.) This was finally changed at McKinney’s request, made to Cleaveland, and by Cleaveland relayed to defendant (as before) to Glen. Frank and Henry Wilburn, d/b/a Wilburn’s Boat Company, the date of the final endorsement being August 6, 1948. (R. 227.) These persons then owned the vessel, and J. F. Wilburn testified that *he knew* that this was in favor of the partners, not of any corporation. (R. 125-126.) The last endorsement was August 6, 1948 and they did not sell the vessel to the corporation until September 24, 1948. (R. 76-82.) No endorsement to the corporation was asked for or given; there is no such argument.

The Oklahoma corporation to which the Wilburns sold the vessel joins as a plaintiff. *Defendant never contracted with it.*

Apparently realizing that the situation precluded recovery the author of the complaint alleged that an endorsement in favor of the corporation was requested but by mistake was issued to Glenn, Frank and Henry Wilburn d/b/a Wilburn’s Boat Company. (R. 3.) Petitioners made no attempt to prove this averment. It is rejected by the lower

courts' finding, that the sale to the corporation was a violation of the policy.⁷

A unilateral mistake would call for rescission. There is nothing on which to found any argument of *mutual* mistake (which would require the plainest proof—some authorities say, proof beyond a reasonable doubt) and again there is no such argument. The averment of request for an endorsement to the corporation was abandoned at the trial as it is here, but it is worth mentioning as showing the realization of even the author of the complaint that, on the real facts, he could not state a cause of action on this policy. It is the law in Texas, as everywhere else, that a contract of insurance is personal to the assured named therein; it is not a contract *in rem*. *St. Paul Fire & Marine Ins. Co. v. Culwell*, 62 S. W. 2d 100, 101 (Tex. Com. App.). The fact is that these individuals took a policy stipulating that it should be void if the vessel was sold, and it was sold. The concurrent courts below so found, and also that this was a violation of the policy as above quoted. The only issue tendered was performance *vel non*.

The last-quoted provision of the policy is not only that the policy shall be void if the vessel is sold, but also it shall be void if the vessel is pledged. (R. 41-43.) Following the pre-trial proceedings, Petitioners further *stipulated* at the trial (R. 41-43):

"It is further stipulated by the parties that on June 3, 1948, the plaintiffs, J. F., J. H., and L. G. Wilburn, borrowed \$10,000.00 from the Citizens National Bank of Denison, Grayson County, Texas, executing their negotiable promissory note in favor of said bank.

⁷ In connection with this averment it is interesting to note that when plaintiffs presented the policy in evidence, they had attached on it *two* endorsements dated August 6, 1948, both running to the individuals, one of them unexecuted (R. 226-227). Plaintiffs got the second of these two endorsements when their agent McKinney *after the loss*, wrote H. H. Cleveland Agency for a copy of the endorsement running to the individuals (Dep. Rossow Ex. 13).

Thereafter, on August 4, 1948, Wilburn Bros. Boat Company, acting by J. F. Wilburn and J. H. Wilburn borrowed an additional \$10,000.00 from said bank, executing their negotiable 90-day promissory note therefor, being Exhibit 1 attached to this stipulation.

"The boat involved in this case, the Wanderer, was pledged to said bank by said Wilburn Bros. Boat Company, acting as aforesaid, by chattel mortgage of August 4, 1948, being Exhibit 2 attached to this stipulation.

"On October 4, 1948, a negotiable 90-day promissory note for \$10,000.00 was given to said bank, signed 'Wilburn Boat, Inc.' by J. H. Wilburn, being in renewal and extension of the above mentioned note of August 4, 1948. Said note of October 4, 1948, is Exhibit 3 attached to this stipulation.

"On October 21, 1948, the boat was pledged to said bank by chattel mortgage of said date, signed 'Wilburn Bros. Boat Company, a Corporation, by L. G. Wilburn, President, J. F. Wilburn, Secretary', such chattel mortgage being Exhibit 4 of this stipulation.

"On October 25, 1948, 'Wilburn Bros. Boat Company, a Corporation' acting by L. G. Wilburn, President and J. F. Wilburn, Secretary, executed a negotiable one year promissory note in favor of J. F. Wilburn and J. H. Wilburn for \$8,000.00, being Exhibit 5 attached to this stipulation.

"On the same date 'Wilburn Bros. Boat Company, a Corporation', acting as aforesaid, pledged said boat to said J. F. Wilburn and J. H. Wilburn by chattel mortgage of said date, being Exhibit 6 attached to this stipulation.

"The indebtedness of \$20,000.00 to said bank and of \$8,000.00 to J. F. Wilburn and J. H. Wilburn, above mentioned, were unpaid at the time the boat sank as a result of being burned by fire on February 25, 1949, and the chattel mortgages above mentioned had not been released at said time but were in full force and effect.

"The indebtedness and pledges hereinabove mentioned were created and made without the consent of the defendant.

"On May 12, 1949, the defendant Fireman's Fund Insurance Company tendered to Glen, Franklin and Henry Wilburn, DBA Wilburn Boat Company, Denison, all premiums paid to the defendant under the policy involved in this case from the time that the boat Wanderer was purchased by said J. F., J. H., and L. G. Wilburn. This tender was refused on May 19, 1949, without objection to the form or sufficiency of the tender.

"It is further stipulated that the plaintiff, Wilburn Boat Company, an Oklahoma Corporation, has never had and does not now have a permit to do business in the State of Texas."

Yet another provision of the policy states (R. 241):

"This Entire Policy Shall Be Void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or, in case of fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof; whether before or after a loss."

Before the Court of Appeals Petitioners in their brief frankly admit that the representation of a \$40,000 investment in the vessel was untrue.⁵ They argued that a Texas statute (Vernon's Texas Statutes, 5050) made all misrepresentations immaterial that were not in a writing attached to the policy. But that statute by its express terms applies only to policies "contracted for or issued" in Texas, and on the actual fact, *supra*, namely, that this policy was issued and contracted for in Illinois, the Texas statute was itself irrelevant.

In this connection reference is made to what already has been said. It may be added that the defendant, which in-

⁵ As Petitioners put it in their brief to the Court of Appeals: "By reason of a 25% error in a guess as to the cost price of a converted vessel appellee urges that the policy be forfeited on the grounds of misrepresentation." (Petitioner's C. A. Brief, P. 31) This judicial admission makes it unnecessary to wade through the accounting at the trial, which would show, we think, that the misrepresentation was even more extreme than plaintiffs admit.

creased the amount of this coverage from \$10,000.00 to \$40,000.00 (Dep. Rossow 30; R. 229, 230) solely on the admittedly false representation that assured now had an investment in the vessel of that larger sum (*vide supra*) then asked for a survey (Rossow Dep. Exh. 29) in which (R. 260) the following information was particularly asked for as "necessary":

"Cost of vessel to present owner:" to which assured replied: "\$30,000 plus \$10,000 for engine, lighting and fire fighting equip." (R. 261.) Whether this renewal of the original false representation that assured had \$40,000 invested in the vessel came to the insurer's attention before or after the loss is not material to the question whether it was a further breach of the policy, which makes any misrepresentations *or concealments* "whether before or after loss" a breach voiding the policy, as above quoted.

In the same connection the insurer asked for "Particulars of any mortgage or other encumbrance" to which J. F. Wilburn for the partnership consisting of himself and the other two Wilburn Brothers answered: "None." (R. 261.) It is now stipulated that in fact the vessel was then pledged for \$20,000 to a bank, and for \$8,000 by the corporate owner to two of its shareholders. (See Stipulation, quoted above.)

The policy repeats again and again, as the provisions quoted make plain, that the assurer consents to be bound for the premium charged only on the terms expressed in the policy, and no other, expressly making compliance by the Assured with the terms of the Policy condition precedent to the right of recovery, as follows:

"No **SUIT OR ACTION** on this policy for the recovery of any claim hereunder shall be sustainable in any Court of Law or Equity unless the Assured shall have fully complied with all of the foregoing requirements, etc. (R. 241.)

"This Policy is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specially referred to and made part of this Policy, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this Policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the Assured unless so written or attached." (R. 235.)

The policy covers a vessel in several states, first on a voyage from Greenville, Mississippi, via the Mississippi and Red Rivers, and then on Lake Texoma, which lies in two states (R. 119-120; 152-153) as its name implies, the principal navigable portion of the lake being in Oklahoma. (R. 1-4.) At the trial plaintiffs disputed that Lake Texoma was "navigable waters of the United States" but the lower court found as a fact that it is. (R. 33.) Petitioners did not challenge that finding in the Court of Appeals (R. 279-280), the Court of Appeals expressly concurred therein (R. 2-96), and Petitioners do not bring the question forward here.⁹

Not disputing the navigable character of the waters, Petitioners complain, however, that a test of *locale* was applied

⁹ The Court of Appeals referred also (R. 280) to evidence supporting the finding; see cross-examination of plaintiffs' witnesses, J. H. Seersing, R. 146-155 and J. F. Wilburn, R. 119-126. (See also *U. S. v. Appalachian Power Co.*, 311 U. S. 371, especially pp. 408, 409 and cas. cit., and *Davis v. United States*, 185 F. (2d) 938 (CA 9, 1950) so holding as to Lake Tahoe, which is on an inaccessible mountain top, but lies in two states; and, among other authorities referred to by the Court of Appeals, the decision of this Court in *Insurance Co. v. Dunham* (78 U. S. 1, 25), where this Court held that the maritime law extends "to all navigable waters of the United States, whether landlocked or open, salt or fresh, tide or no tide.")

below to determine the maritime character of this contract. (Petition, p. 9.)

The complaint is groundless.

Among the outstanding characteristics of *the nature of this contract* is that it insured a navigating vessel on navigable waters of the United States expressly named therein in several states.

Besides its subject, history and purpose, the nature of this contract, further appearing from its form and terms, is that of a typical maritime contract of marine hull insurance, with provisions whose meaning and effect has been settled by a long course of decisions under the general maritime law, from its "perils of the seas" clause to its "general average" clause, as hereinafter more particularly detailed. (Cf. *infra*.) It is plain on the face of the document that this is a maritime instrument made with reference to the maritime law. When Petitioners were before the Court of Appeals they expressly conceded that it was a contract of marine insurance, as the Court of Appeals points out. (R. 279.)

The fact so established has its significance, together with the coverage of the vessel by the policy for navigation in numerous states, and with the history and terms of the contract, in connection with the further fact that, like all contracts of marine insurance, this is a maritime contract, whose validity and effect the Constitution requires to be governed by a uniform national law, to-wit, the general maritime law; and not by 48 different sets of laws; and the consequent incapacity of state legislatures to destroy the uniformity intended by Constitution—or of Congress to give them permission so to violate the Constitution.

The vessel performed the voyage from Greenville, Mississippi, to Lake Texoma via the Mississippi and Red Rivers, and was skidded¹⁰ over the dam into Lake Texoma where

¹⁰ See *U. S. v. Appalachian Power Co.*, 311 U. S. 371, 409.

her regular berth was at Burns Run Resort, in Oklahoma. (R. 97, 106, 119, 120.) She made voyages from this berth, and return thereto, sometimes crossing the Oklahoma-Texas line in doing so. (R. 98.) She was on the Texas side for the temporary purpose of repairs from time to time. (R. 106, 144, 153.) After the Petitioners had encumbered the vessel for \$20,000.00, and the bank had refused to loan any more money on it (R. 125), after they then had further encumbered the vessel for \$8,000.00 more to two of the Wilburns, and while she was unemployed and apparently deserted, she was burned by fire and sank (R. 40-41) in the small hours one night, near her ordinary berth but a little further offshore. (R. 119, 120.) It was in Oklahoma that she burned and sank. (R. 97.)

The policy is endorsed: "Yacht Policy No. YA 28579 Fireman's Fund Insurance Company, San Francisco, California, Western Marine Department, Insurance Exchange Building, 175 West Jackson Boulevard, Chicago 4, Ill." (R. 254.) It recites that it is "not valid unless countersigned" by a duly authorized agent of the company. (R. 254.) It is "countersigned at Rock Island, Illinois" by H. H. Cleveland Agency (R. 254) of that city (White Dep. 3) to which company of Rock Island, Illinois, all endorsements were sent (Dep. Rossow *passim*) for such signature. (R. 226-254.) The policy mentions three offices of the company: New York, San Francisco, and Chicago. (R. 252, 255.) Losses are to be reported "to the nearest office of this Company or to the Agent who shall have issued this Policy" which localizes important performance outside of Texas, and, with the fact that the contract was made in Illinois (*vide supra*) excludes the law of Texas under this Court's decisions upon the effect of the due process clause of the XIVth Amendment to the Federal Constitution (*Hartford Indemnity Co. v. Delta Co.*, 292 U. S. 143, 149-150) and, incidentally, under the rule of conflicts observed in Texas.

(*Fidelity Mutual Life Ass'n. v. Harris*, 94 Texas 25, 35; 57 S. W. 635, 638.)¹¹

Demand for payment on this policy was made by letters and proof of loss enclosed to the H. H. Cleaveland Agency, addressed to it and Defendant (and, curiously, to Petitioner's man McKinney) (R. 142; Rossow Dep. Ex. 49) and rejected by letter from Defendant's Chicago office which Petitioners put in evidence without limitation as their Exhibit 2. (R. 255-260.)

Petitioners having stipulated and admitted that they broke this contract again and again, seek to find a law that would permit them to violate their agreement and still recover on it. There is no argument that the general maritime law would allow that, or the law of Illinois where the contract was made, or the law of Oklahoma where the vessel was lost and the then owner of the vessel resided.¹² Petitioners' position appears to be confined to the propositions that (1) Texas has made laws whereby they were free to break their contract and still recover on it; (2) Texas laws govern the validity and effect of the terms of this contract.

We believe both propositions to be mistaken.

That the interpretation and effect of the provisions of maritime contracts, of which the contract of marine insurance is one of the most important, is governed under our Constitution by the general maritime law, is settled by many decisions in this Court and the lower Federal Courts.

¹¹ Since the loss here did not occur in Texas, and the warranty of only pleasure use of the vessel called for performance in whatsoever state she might be, the present situation bears a strong *a fortiori* to *Hartford Ins. Co. v. Delta Co.*, 292 U. S. 143, *supra*.

¹² See *Brown v. Connecticut Fire Ins. Co.*, 153 Pac. 173 (Okla.).

Petitioners lack the temerity to face these cases and ask this Court to overrule their doctrine, on which the business of marine insurance rests in its "great field." (Cf. Holmes, J., for the Court, in *Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487). They are unable to cite a single decision to the contrary *in the whole course of our national history*. They present the argument, for which no authority is cited, that the *McCarran Act* has given states the power to substitute 48 different rules, for the single uniform rule of the general admiralty or maritime law, intended by the Constitution in maritime affairs. That Congress is incapable of giving the states such powers appears to be settled by the decisions of this Court. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 386, and *cas. cit.*) Moreover, no such revolution was within the intent of the *McCarran Act* and statutes will be construed to avoid even substantial doubt of their constitutional validity. (*Panama R. R. Co. v. Johnson*, 264 U. S. 375, *supra*; *Messel v. Foundation Co.*, 274 U. S. 427; *Chelentis v. Luckenbach*, 247 U. S. 372) There are other objections, as pointed out below, to Petitioners' suggestion that, by the *McCarran Act*, Congress has in effect amended the Constitution by empowering states to substitute their diverse and clashing codes for the nationally uniform maritime law, a law that under the *Constitution* is subject to change only by Congress, and only within the limitations of the Constitutional requirement of national uniformity.

This contract was made and issued in Illinois, covering a vessel that was located in Mississippi when it attached, covering it while it was used thereafter in several states, on navigable waters of the United States, that was rarely and only transitorily in Texas, and whose home berth was in Oklahoma. Defendant never asked anybody to enter into this contract; the approach was from the Petitioners'

side to H. H. Cleaveland Agency, in Rock Island, Illinois, which was requested to ask Defendant, acting in Chicago, Illinois, to continue this policy for the new owners and the necessary endorsement was completed and issued in Illinois. By the law of Illinois where it acted, H. H. Cleaveland Agency, which had no general authority to commit Defendants on risks so far from home (White Dep. 12, Exh. 1; Rossow Dep. 42) was Petitioners' agent when, at McKinney's request, it telephoned and wrote and went to see Defendant, to induce it to issue this policy. (*France v. Citizens Casualty Company*, 400 Ill. 55; 79 N. E. 2d 28 (1948). See also, *Insurance Co. v. Midwest Transfer Co. of Illinois*, 178 F. (2d) 191 (CA 7, 1949).) The endorsements were never signed by a Texas agent; they were in each instance prepared by Defendant in Illinois, and sent to H. H. Cleaveland Agency in Illinois, which countersigned them in Illinois, and mailed them in Illinois. (*Vide supra*.) If a loss had occurred after that mailing in Illinois but before receipt of the policies in Texas, Petitioners would have no difficulty in perceiving that such mailing in Illinois was the last act needful to make them effective. (Auth. cit.) Appellants' reliance is on the circumstance that the Wilburn brothers are inhabitants of Texas, and they cite in a footnote (Petition, p. 7) Texas Insurance Code, 1951, Sec. 21.41 (*Vernon's Texas Statutes*, 5054), upon which they heavily relied before the Court of Appeals, and which purports to make Texas laws govern every contract of insurance payable to any citizen or inhabitant of Texas by any insurance company doing business in Texas.

Obviously, this contract did not constitute doing business in Texas. This Court holds that a state has no power, under the 14th Amendment to the Federal Constitution, to subject a contract to its laws on the ground that one of the parties thereto is its citizen. (*Hartford Ind. Co. v. F. I. Co.*, 292 U. S. 143); and an attempt by a state to

require submission to its laws, as to contracts with its citizens that are completed in other states, would be a void attempt to exercise extra-territorial authority under the 14th Amendment. (*Fidelity & Deposit Co. v. Tafona*, 270 U. S. 426.) Most interestingly, whatever other business a company might be doing in Texas,¹³ the Texas courts themselves decline to give this Texas statute the construction and effect contended for. Even though the contract is with an insurer doing other business in Texas, and is payable to a citizen of Texas, when in fact, such contract was made in another state (as this contract was made and completed in Illinois), the Texas court holds it to be governed by the law of such other state, where it was made. (*Washington National Ins. Co. v. Shaw, et al.*, 180 S. W. (2d) 1003 (Tex. Civ. App.); *Metropolitan Life Ins. Co. v. Greene*, 93 S. W. (2d) 1241 (Tex. Civ. App.).)

But assume (not concede) that Texas laws did apply; what do they say?

Section 6.14 (Vernon's Texas Statutes, 4930) says the breach must contribute to the loss. In the construction that Petitioners assume to be the correct one, such a provision, which, by its very nature cannot itself be a cause of the loss, would never be enforceable in Texas. Appellants overlook that by the settled construction of this Texas statute by the Texas courts themselves, such a provision, for the very reason that breach thereof cannot itself contribute to the loss, is not within the contemplation of this statute. As we have already pointed out (*vide supra*) the rule is a well-settled feature of Texas jurisprudence, and such provisions, whose breach could not of itself contribute to the loss because they are of the kind that could not, are enforced as written, and their violation precludes recovery—under the law of Texas. (*Home*

¹³ And this record does not show that this defendant ever did, or solicited any, there.

Ins. Co. of New York v. Henderson, 263 S. W. 650 (Tex. Civ. App.) *supra*; *National Fire Ins. Co. v. Carter*, 237 S. W. 1089 (Tex. Com. App.) *supra*, and other Texas authorities referred to above.)

Again, Petitioners say that any provision against mortgaging insured property is void, relying on Texas Insurance Code, 1951, Sec. 5.37 (Vernon's Texas Statutes 4890). This section of the Act says that it applies, as quoted by Petitioners at Petition 6, to "any company subject to the provisions of this law." It is one section of that law, whose preceding and defining section (Vernon's Texas Statutes, 4880; Texas Ins. Code, 1951, 5.27) defines the companies subject to that law in terms of the nature of the particular risk written. (See margin)¹⁴

It will be observed that this present situation is excluded by both the commencement and the conclusion of the defining section of this law. This was not a policy of insur-

¹⁴ Texas Ins. Code 1951, pp. 74, 75, Sec. 5.27:

"Every fire insurance company, every marine insurance company, every fire marine insurance company, every fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire *on property within this State*, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign country (sic), whether such company is organized under the laws of this State or under the laws of any other state, territory or possession of the United States, or foreign country, or by authority of the Federal Government, now holding certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this subchapter and that it agrees to transact business *in this State*, subject thereto; *it being intended* that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this subchapter, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary & in transit, including *the shore end* of all marine risks insured against loss by fire." (Our emphasis)

ance "on property within this state," viz., Texas, "nor a transaction" in that state. (*Vide supra.*) Especially significant, the concluding phrase defining what is "intended" by this act says: "including *the shore end* of all marine risks insured against loss by fire." *Expressio unius est exclusio alterius.*

Policies covering property in transit by land and water are familiar, but there was no "shore end" to this marine risk. It was a maritime contract of insurance on the hull of a navigating vessel against the perils of the seas (in the classic language of the marine perils clause on hulls) and liability for collision with any other ship or vessel, covering the vessel on navigable waters of the United States where she was burned and sank 300 feet from shore, in the boundaries of the State of Oklahoma (R. 119). The enactment just quoted, against the background of such cases as *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121 (CA 5, 1931), is manifestly a disclaimer of any intent to apply this sub-chapter to the *water end* of marine risks such as this.

Again Petitioners argued that their misrepresentations were not available defenses, because, they said, the Texas statute says no misrepresentations can be relied on that are not incorporated in an application attached to the policy, relying on *Texas Insurance Code*, 1951, Sec. 21.24 (*Vernon's Texas Statutes*, 5050) and cases decided on Texas contracts. This Texas statute refers only to contracts or policies "issued or contracted for" in Texas. This contract or policy of insurance was not expressed, like some life policies, to be effective only when the premium was paid, and it is perfectly well settled that in the absence of such expression the contract is effective without payment of the premium. 44 *Corpus Juris Secundum*, 1055, 1075. This policy was contracted for and issued in Illinois—according to Texas law. (*Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25, 57 S. W. 635, 638-639.) The rule

is very old (the *Harris* case cites and relies on *Shattuck v. Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715) and it is the rule announced by the *Restatement, Conflicts of Law*, Sec. 317. As the Texas court put it in the leading Texas case:

“The general rule is that the acceptance of the application and the issuance and mailing of the policy are all the acts that are essential to put the contract in force, and the fact that the policy is sent to an agent for unconditional delivery does not alter the effect of the transaction. *Shattuck v. Insurance Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715.”

Fidelity Mut. Life Assn. v. Harris, 94 Texas 25, 57 S. W. 635, 639.

Again, Petitioners would rely on *Texas Insurance Code*, 1951, Sec. 21.04 (*Vernon's Texas Statutes*, 5056) to make McKinney the “agent” of this defendant (and they grossly misquoted this statute to the District Court when they argued the case to it) (R. 218-219). Here, they lift a section of the act out of its context and fail to advise this Court of the settled construction of this law by the Texas courts, *a construction that has been recognized by this Court*, and which excludes it from any possible significance here. Actually, this is one section of a statute, which, in the first and next preceding section says that it shall not be lawful for anyone to act as an insurance agent in Texas “without first procuring a certificate of authority from the Board,” and proceeds, in the next section, the one relied on by Petitioners, to say that any person who does certain acts shall be regarded as the agent of the company “as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter.” These “liabilities, duties, requirements and penalties” are certain criminal, penal and administrative regulations of persons who solicit insurance in Texas; it is held by the Texas courts that this Texas statute does not purport to make the assured's

broker into an "agent" for the company in the general or ordinary sense, and especially not in the sense of estopping the insurer by his knowledge. (*Hartford Fire Ins. Co. v. Walker*, 94 Tex. 473, 61 S. W. 711; *Retailers Fire Ins. Co. v. Jackson Gin Co.*, 10 S. W. (2d) 799 (Tex. Civ. App.); *U. S. Fidelity & Guaranty Co. v. Taylor*, 273 S. W. 320 (Tex. Civ. App.); *Boseman v. Insurance Co.*, 301 U. S. 196, 206.)¹⁵

It would seem therefore that even if the laws of the State of Texas were to be construed as meant to govern this contract merely because the payee lived in Texas, it would be a void attempt to give those laws extraterritorial effect. And even if that provision had made, or could make, other Texas laws applicable, they have not been so written as to make them applicable to this situation.

As stated, the case went to trial on the Petitioners' averment that they had performed the provisions and conditions of the policy, and Defendant's denial of that averment specifying the provisions breached. The trial re-

¹⁵ McKinney was a man to whom the Wilburns went to get their insurance; having no facilities for procuring marine insurance he approached H. H. Cleaveland Agency of Rock Island, Illinois, asking it to contact this defendant in Chicago and secure this insurance, as pointed out above. He acted throughout as a representative of assured, seeking the insurance, and arguing with Cleaveland in correspondence for the claim. (Rossow, Dep. passim.) This defendant does not appear ever to have heard of him, and does not appear to have had any communication or dealing with him whatever, in connection with anything or at any time. At one time, after the policy issued, he attempted to foist himself on Cleaveland as having become meantime an agent for this defendant, but the District Court struck this from the record on settled principles (R. 160, 161) and Petitioners assigned no error on the ruling in the Court of Appeals nor do they complain of it here. There is no claim or finding that McKinney was in fact agent of anyone but the Wilburns; on the contrary, Petitioners themselves made part of the record their Exhibit 2 (R. 255-260) which further shows that McKinney never was agent of this defendant, for this or any other transaction. Petitioners did not call their man McKinney to testify.

sulted in stipulation of Defendant's breaches (R. 40-43). Petitioners had not proved performance of the provisions and conditions of the policy, but had stipulated their breach (R. 40-43). The trial also resulted in such proof that Petitioners now admit that the representations of a \$40,000.00 investment in the vessel were false (*see supra*). Accordingly, Defendant moved to dismiss (R. 176) under the rules governing the Federal Court's procedure, under which it is held:

"Appellee takes the position, in which we concur, that under Rule 41 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., upon a motion to dismiss at the close of the plaintiff's case, the trial court determines the facts without being thus limited and must weigh and evaluate the evidence.

"(2) In this case the trial court was the trier of the facts, and in considering the evidence was not bound to view it in a light most favorable to the plaintiff, with all attendant favorable presumptions, but was bound to take an unbiased view of all the evidence, direct and circumstantial, and accord it such weight as he believed it entitled to receive. Rule 41 (b), Federal Rules Civil Procedure, *supra*; *Gary Theater Co. v. Columbia Pictures Corporation*, 7 Cir., 1941, 120 F. 2d 891, 892; *Young v. United States*, 9 Cir., 1940, 111 F. 2d 823, 825; *Bach v. Friden Calculating Mach. Co.*, 6 Cir., 1945, 148 F. 2d 407, 411.' "

Allred v. Sasser, 170 F. 2d 233, 235 (CA 7, 1948).

The policy is in writing; the Petitioners' breaches are stipulated and admitted. No question was made in the Court of Appeals, and accordingly as between these parties for the purposes of this case none can be, or is, made here, that Lake Texoma is navigable waters of the United States, or that this was a maritime contract of a most important and familiar type, namely, a contract of marine insurance. The District Judge (like the Court of Appeals) found it unnecessary to labor questions of the conflict of laws between the states, for the reason that the parties in fact had

obviously contracted under the maritime law,^{15*} and some time before his death made and filed with the Clerk (R. 32-34) the following findings of fact and conclusions of law:

UNITED STATES DISTRICT COURT
Eastern District of Texas

RANDOLPH BRYANT
U. S. District Judge

Sherman, Texas
December 28, 1950

Re: Civ. 503 Sherman Division
*Wilburn Boat Company v. Fire-
man's Fund Insurance Company*

Gentlemen:

After much consideration of the above matter, I am of the opinion that the policy involved here is a maritime contract and therefore governed by the general admiralty law and not by the law of Texas, since the policy covered the vessel on navigable waters of the United States, without as well as within the State of Texas, and I find that the waters of Lake Texoma are navigable waters of the United States.

Since the policy contained an express provision "that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred pledged without the previous consent in writing of the assurers", and since it is admitted that the assureds were Glenn, Frank and Henry Wilburn, and that they did assign their interest in the vessel to an Oklahoma corporation, and since it is further admitted that they pledged the vessel to the Denison bank, a failure of performance of the terms of the contract is indisputably shown, and for such reason they are not entitled to recover.

Further, it was "warranted by the assureds that the within named vessel shall be used solely for private pleasure purposes during the currency of this policy and

^{15*} The District Judge cited page 313 of this Court's opinion in *Union Fish Co. v. Erickson*, 248 U. S. 308, where it was held: "The parties must be presumed to have had in contemplation the system of maritime law under which it was made."

shall not be hired or chartered unless permission is granted by endorsement hereon". The record shows without dispute, that this warranty was violated and that no permission was ever granted by endorsement on the policy for use other than for private pleasure purposes.

I think that the authorities are clear to such effect. *Aetna Insurance Company v. Houston Oil & Transport Company*, 49 F. 2d 121 at page 124; *Imperial Fire Insurance Company v. Coos County*, 151 U. S. 452; *Union Fish Company v. Erickson*, 248 U. S. 308 at page 313.

Inasmuch as the above findings, in my opinion, are determinative of the issues in this case, I do not think it is necessary to make any other findings of fact, and attorneys for the defendant may prepare findings of fact and conclusions of law in accordance with the above, as well judgment pursuant thereto, furnishing attorneys for plaintiffs with a copy of such proposed findings, conclusions and judgment.

Yours very truly,

/s/ RANDOLPH BRYANT.

I.

Under the due process clause of the XIVth Amendment to the Federal Constitution, by which no state can give its Legislation extra-territorial effect, the only question brought forward by this Petition, namely, a supposed conflict between the General Admiralty or Maritime Law and the Texas Law, cannot arise as to this Contract—which was made in Illinois. No question of conflict between the General Admiralty or Maritime Law, and the Illinois Law, is brought forward; No claim is made that there is any such conflict, or that Illinois Law, any more than the Maritime Law, would permit Recovery in the teeth of the terms of the contract. The Petition here brings forward and argues only the moot question of a supposed conflict between the General Maritime Law and Texas Law. We do not understand that certiorari will be granted to consider arguments addressed to a moot question, especially when Petitioners, by incorrect statements of the record, carefully avoid raising the only question that could give those arguments relevance to the correctness of the judgment of dismissal.

The real facts are that, contrary to the assertions of the Petition (pages 2 and 7, for example) this policy was neither solicited nor made “within the boundaries of the State of Texas.” It was made, and completed, and delivered, in the State of Illinois. (*Vide supra*.)

It was a typical policy of marine hull insurance; and marine hull insurance is written on the basis of the general maritime or admiralty law. (*DeLovio v. Boit*, 2 Gall. 398; Fed. Cas. No. 3,776 at p. 443 (CA 1, Mass. 1815).) But even if that were not so, and even if state laws governed the effect of contracts of maritime insurance, the due process clause of the XIVth Amendment to the Federal Constitution would forbid any effect to Texas legislation upon *this* contract which among other things (*vide supra*) was made

in Illinois with the "Western Marine Department, Chicago, Illinois" of a California company not shown ever to have solicited this or any insurance in the State of Texas, upon a vessel then in Mississippi, that was afterwards navigated in several states with a home berth in Oklahoma, and that was lost in Oklahoma while owned by an Oklahoma corporation not domesticated in Texas. (*Hartford Indemnity Co. v. Delta Co.*, 292 U. S. 143; *Fidelity and Deposit Co. v. Tafoya*, 270 U. S. 426.)

That is a proposition of federal law under the XIVth Amendment.

Not one word of this Petition *makes any argument* that the law of Illinois would condone Petitioners' stipulated breaches of this contract.

The short answer to this Petition for Certiorari is that it depends on the unsupported misstatement that this contract was made in Texas (whose law is argued to condone the admitted breaches) whereas in truth and fact it was made in Illinois, and that, for federal reasons, of due process, the law of Texas can have no application here; there being no attempt even to claim that the law of Illinois would permit a recovery in the teeth of these admitted breaches, and no pretense of bringing forward any such question. Accordingly, since the Petition does not even claim any conflict between the effect of the general maritime law and the laws of any state that, for federal reasons of due process could even be claimed to govern this contract, the question of conflict between the general admiralty law and state laws does not arise upon the presentation made.

The foundation of the Petition, and the only matter argued by the Petition, is an assumed conflict between the general maritime law and the law of Texas, which, if it existed, would be immaterial, for federal reasons of due process, since the law of Texas cannot affect the result even if there were no such thing as the general maritime

law. A conflict between the law of Illinois and the general maritime law is not even hinted by the Petition, to say nothing of being distinctly brought forward. (Supreme Court Rules, Rule 38 (2).)¹⁶ The basis of the Petition to this Court is a series of bald misstatements to the effect that the contract was made in Texas. These statements of the Petition are not true, and under the due process clause of the XIVth Amendment the question of a conflict between the maritime law and *Texas* law is moot as to this contract, which was not made in Texas.

The question of conflict between general maritime law and Illinois law not being brought forward by this Petition, none of the matters it argues, however interesting, is here for decision. We submit that whatever view might be taken of the matters it argues, the Petition should be denied, for the reason that it scrupulously avoids bringing forward the one question that could make those matters relevant.¹⁷

Doubtless we could, and probably we should, end this reply here.

Lest it be thought that we find any substance in Petitioner's argument, however irrelevant it may be to any question truly arising on the Petition and record, we now answer Petitioners' propositions in detail. They are propositions revolutionary of Constitutional doctrine that has been reiterated for generations, on which important parts of the

¹⁶ "Only questions specifically brought forward by the petition for certiorari will be considered."

¹⁷ Of course the reason why Petitioners carefully avoid raising that question, is that Illinois leaves the effect of the terms of policies of marine insurance to be governed by the general maritime law, as mentioned *infra*, and if they were to bring forward that question—the only question that could make the matters they argue relevant to the correctness of the judgment—the judgment would immediately be affirmed. See also, *Langnes v. Green*, 282 U. S. 531, 538, for a further distinct point.

national economy depend, including the "great field" of marine insurance.

II.

This Maritime contract was governed by uniform Admiralty or Maritime Law. These Petitioners admitted on brief before the Court of Appeals that the McCarran Act was intended only to undo the effect of the Southeastern Underwriters Case. It was so intended; and should be so construed, in view of its language, legislative history, and the construction hitherto given it, especially as it would be void insofar as construed to destroy the national uniformity of the Maritime Law that governs Marine Insurance.

Before the Court of Appeals Petitioners conceded that this is a contract of marine insurance (R. 279) and that Lake Texoma is navigable waters of the United States. (R. 280.) They raise no question about such facts here.

The Constitutional significance of these facts is not minimized by the brevity of the concession.

This was a contract insuring a vessel against navigating perils in more than one state on navigable waters of the United States, named therein. It is expressed in terms that have characterized marine insurance, in this country and abroad, for generations (R. 233-247).

Its "perils of the seas" clause (R. 236) is in the classic form, hardly to be understood apart from its interpretation by the courts under the general admiralty or maritime law (*Union Marine Ins. Co. v. Stone*, 15 F. (2d) 937 (CA 7, 1926), and set forth in all standard works on the law of marine insurance published here or in England. (See *Arnould on Marine Insurance*, Sec. 374 (13th Ed. 1950).) Its clause as to the negligence of "masters, mariners, engi-

neers or pilots" (R. 238) came into the world-wide law of marine insurance through a decision of the House of Lords in the case of the vessel "Inchmaree" which established the general maritime law here and abroad (*Arnould on Marine Insurance, supra*, Sec. 783.) Its collision clause (R. 239, 245) is the familiar collision clause common to English and American policies of hull insurance. (*Arnould on Marine Insurance, supra*, Secs. 792-796.) Examples could be multiplied of terms and provisions in familiar use in marine insurance, whose whole meaning and significance is fixed by the general admiralty or maritime law, and which the Court will readily perceive. (R. 233, et seq.).

Some of these are the "sue and labor" clause (R. 237; *Arnould on Marine Insurance, supra*, Sec. 22); "protection and indemnity" clause (R. 249; *Winter, Marine Insurance* (3rd Ed. 1951), pp. 274, 306) the "free of capture and seizure" clause (R. 237; *Arnould on Marine Insurance, supra*, (Sec. 905a-1)) and the "general average" clause (R. 244; *Arnould on Marine Insurance, supra*, Secs. 906-1007).

It would seem almost too plain for debate that this contract was made with reference to the general maritime law. The law of marine insurance is one of the outstanding and characteristic features of the general maritime law. This Court holds that as to that aspect of the general maritime law that governs marine insurance, there are "special reasons" for maintaining it in harmony with the law of England. *Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487. This is the ruling case, and the ruling doctrine in the Courts of this country. As the Court of Appeals for the Second Circuit says, "in matters maritime, and especially insurance, the importance of conformity between the English law and our own has been often emphasized." (Cit. auth.) (*New York & Oriental S. S. Co. v. Automobile Ins. Co.*, 37 F. (2d) 461, 463.) In the language of Augustus N.

Hand, J., "it is particularly desirable in cases of marine insurance that the decisions of the American and English Courts should be in harmony." *Mellon v. Federal Ins. Co.*, 14 F. (2d) 997, 1004.

Under the admiralty clause of the Constitution, the states are powerless to enact legislation that would "work material prejudice" to the characteristic features of the general maritime law "or interfere with the proper harmony and uniformity of that law in its international and interstate relations"—and Congress is equally powerless to give the states permission so to violate the Constitution. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

There is no argument that the clashing insurance codes of the states would not have the constitutionally forbidden effect. Appellants ignore, and thus confuse, the Constitutional situation.

Except in cases turning on the Constitution, Federal Statutes and Treaties, there is no Federal common law; the diversity clause of the Third Article of the Constitution gives jurisdiction for the purpose of preventing local discrimination against non-residents in the judicial administration of law. (*Eric R. R. v. Tompkins*, 304 U. S. 64.)

The admiralty clause of the Third Article of the Federal Constitution gives Federal jurisdiction for a further reason; there is a general maritime law:

"As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times and during the Confederation and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it

to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view; Congress acted on it, and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision.”

Panama R. R. Co. v. Johnson, 264 U. S. 375, 385.

This Court's doctrine has been clear:

“As the plain result of these recent opinions and the earlier decisions on which they are based, we accept the following doctrine: The *constitution itself* adopted and established, as part of the laws of the United States, approved rules of the general maritime law. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160.)

A contract of marine insurance is a maritime contract. *Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870).

In holding that a policy of marine insurance is a maritime contract, this Court said:

“Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom.”

"It is, in fact, part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?"

Insurance Co. v. Danham, 11 Wall. (78 U. S.) 1, 31, 34 (1879).

This Court said further (*Ibid*, 35):

"The learned and exhaustive opinion of Mr. Justice Story in the case of *De Lovio v. Boit*, 2 Gallison, 398, affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition."

In the leading case so referred to, Mr. Justice Story held that a policy of marine insurance is a maritime contract under the admiralty clause of the Federal Constitution, and the climax and ultimate *ratio decidendi* of that classic opinion is of special pertinence. Rejecting the well-known restrictions of the old English common law courts and early constraining acts of Parliament, to which he referred as "statutable restrictions," the analysis concluded as follows:

"At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a *uniformity of rules and decisions in all maritime questions*, authorize us to believe that national policy, as well as juridical logic, require *the clause of the constitution to be so construed*, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction." (Our emphasis.)

De Lovio v. Boit, 2 Gall. 398; F. C. No. 3,776 at 443.

The opinion of the Supreme Court in the *Dunham* case, *supra*, holding a policy of marine insurance to be a maritime contract holds further that the jurisdiction extends "to all navigable waters of the United States, whether landlocked or open, salt or fresh, tide or no tide." (*Insurance Company v. Dunham, supra*, 25.)

It is apparent from these decisions, and has often been held, that the Constitutional purpose and policy requiring that the source of maritime law is never the states, but always the Federal sovereign, is that the Constitution "contemplated a body of law with *uniform* operation." (*Detroit Trust Co. v. Barlum S. S. Co.*, 293 U. S. 21, 43.) For Congress to try to substitute the diversity of state laws for a uniform maritime law would be as offensive to the Constitution as for the states to do so; the Constitutional purpose that forbids the one, equally forbids the other. And so this Court holds. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Panama R. R. Co. v. Johnson*, 264 U. S. 375, *supra*.

Petitioners seek deftly to embroil the present question in the controversy that arose out of *Southern Pacific Co. v. Jensen*, 244 U. S. 205 by remarking that that particular case has been limited to Workmen's Compensation cases, citing a dictum from the opinion in *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 309, to the effect that "except in Workmen's Compensation the *Jensen* case had lost its "vitality," from which they would conclude that states are now free to substitute their divergent laws for the general maritime law. If their inference from this remark were correct, the uniform general maritime law required by the Constitution would have disappeared in the diverse laws of the states, legislative and decisional. That would be to defeat the Constitution. (Auth. cit.) What Petitioners overlook is that the controversy over the case in the *Jensen* line has not extended to the principles here relied on.

This has been made clear by two opinions of this Court, written by the author of the opinion in *Standard Dredging Co. v. Murphy*, *supra*. The *Jensen* case involved the application of state workmen's compensation laws (which rest on a simple principle of absolute liability) to *stevedores*, men who work in a single harbor. The question whether or not that involved purely local matters, outside the policy of the Constitutional requirement of a uniform general admiralty law, can be, and has been, hotly debated. The point is that the debate has related entirely to that question, which, as pointed out in the first of the two opinions just referred to, is a question of fact. *Davis v. Department of Labor*, 317 U. S. 249 on 254. The degree of localization presented by a stevedore's harbor work, on a vessel at the dock in his port, may, or may not, fall outside the reason of the Constitutional policy requiring a nationally uniform maritime law. On that question of fact the *Jensen* case (except i. Workmen's Compensation cases, where its flat precedent is binding) may or may not have lost its "vitality"; no such doubtful question of fact is presented here.¹⁸

¹⁸ The Court continued in the *Standard Dredging Co.* case:

"In dealing with *employment* insurance, exclusive federal jurisdiction is *not affected at all*. Congress retains power to act in the field, and in the meantime the federal courts have *nothing to do with it*." (*Idem*, 309)

This statement is not true of *marine* insurance contracts, which are distinctively *maritime contracts*. (*Vide supra*.)

It is interesting that, reading the dictum of *Standard Dredging Co. v. Murphy*, the Court of Appeals for the Second Circuit—while it did not go to the absurd extreme advocated by these Petitioners of supposing that the several states were free to substitute their own law for the general maritime law in all but Workmen's Compensation cases—fell into the error of saying, in *Guerrini v. U. S.*, 167 F. (2d) 352, that whether the maritime or state law applies "depends on the forum," an error that is retracted at the first opportunity in *Hedger Transp. Co. v. United Fruit Co.*, 198 F. (2d) 376 (CA 2), on the authority of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, referred to below, *Intagliata v. Ship-owners, etc., Co.*, 26 Cal. (2d) 305, 159 P. (2d) 1, which relies

A contract of marine insurance on the hull of a vessel navigating in several states cannot be contended to be a merely local matter. And Petitioners (who must, if they can, avoid the Constitutional point) make no such argument. In fact, marine insurance written by an insurer in Illinois on the hull of a vessel in Mississippi for navigation in several states in favor of assureds resident elsewhere, is nearly the antithesis of a local matter. It calls into play in the highest degree the considerations held to underly the admiralty clause of our Federal Constitution, namely, the advantages resulting to the "navigation of the United States, from a uniformity of rules and decisions in all maritime questions." (*De Lovio v. Boit*, *supra*, holding that a policy of marine insurance is a matter of "admiralty and maritime jurisdiction" under the Constitution.) To reject, at this late date, the advantages of our Federal Constitution, and the settled doctrine "that national policy as well as juridical logic require the clause of the Constitution to be so construed,"¹⁹ the doctrine which our Courts have followed down through the years—would be strange indeed, when experience so plainly teaches the advantages of a uniform national law for marine insurance that the Courts of the two great maritime nations have striven to achieve uniformity in the law of marine insurance even without the advantage of any federal union. (Auth. cit.)

The second of the two cases above referred to is explicit that the controversy over the Constitutional aspects of the

squarely on *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, *supra*, *Colonna Shipyard v. Bland*, 150 Va. 349; 143 S. E. 729; 59 A.L.R. 497, a case cited by this Court in the *Garrett* case, and *Jansson v. Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950), a brilliant summary of the effect of the cases by the Court of Appeals for the First Circuit, that leaves little to be added. See also *Haven v. Pope & Talbot, Inc.*, 198 F. (2d) 800 (CA 3) repudiating any such construction of this Court's remark in the *Standard Dredging Co.* case as Petitioners seek to put upon it.

¹⁹ *De Lovio v. Boit*, *supra*, as above quoted.

Jensen case has not extended to these principles. In *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, the action, brought in a state court, turned on the validity of a seaman's contract of release. Applying state law the state court of last resort held the release valid. This Court granted certiorari and holding that by the general maritime law the release was void, reversed the state court for the error of applying its own law, even in its own courts, as the measure of the validity of a maritime contract. Clearing away the superficial suggestion that the controversy over the factual aspects of the *Jensen* case had anything to do with these principles, this Court said: "In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law." (317 U. S. on 244.) To this statement this Court cited *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 159; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259; *Messel v. Foundation Co.*, 274 U. S. 427, 434 and *Schuede v. Zenith S. S. Co.*, 216 Fed. 566.

This Court then pointed out explicitly:

"Disagreement over the Constitutional issues of the cases in the *Jensen* line has not extended to this principle. Cf. *The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 43."

In the case of *Detroit Trust Co. v. The Thomas Barlum*, so referred to, the unanimous court said:

"But the grant presupposed a 'general system of maritime law' which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with *uniform* operation. *The Lottawanna*, 21 Wall. 558, 575." (Our emphasis.)

This principle—so reaffirmed, and to which the disagreement in which Petitioners would embroil the present ques-

tion "has not extended"—is obviously necessary if the substantive admiralty or maritime law is not to disappear in diverse state-made rules, legislative and decisional. It is a Constitutional principle (auth. cit.) and neither the states nor Congress can defeat a Constitutional aim, as Petitioners do not dispute.

As pointed out in the passage already quoted from *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 385, *supra*, the *Constitution* itself put into effect as an existing legal system, the general maritime law, to govern maritime contracts and maritime torts. This Court pointed out in *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149:

"As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The *Constitution itself* adopted and established, as part of the laws of the United States, approved rules of the general maritime law." (*Ibid*, 160.)

Quoting its former decision in *The Lottawanna*, 21 Wall. 558, 575, *supra*, this Court said:

"One thing, however, is unquestionable; *the Constitution* must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed," etc. (Our emphasis.) (*Ibid*, 161.)

To permit the laws of the several states to have such effect, would destroy "the uniformity and consistency at which the Constitution aimed" with respect to "all cases of admiralty and maritime jurisdiction." (*Constitution*, Art. III.) These Constitutional doctrines are firmly established by many decisions.

In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, the question was whether a maritime contract (and one there held, rightly or wrongly, *not* to be of purely "local" import) was governed by the general maritime law, or by the law of the State of New York where it was made and performed.²⁰

It was held that the uniformity prescribed by the Constitution required the application of the uniform general maritime law and that the state legislation could not change it. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, was a suit for damages in a common law court. It was held that, though action had been brought in a common law court, that court could only give such relief as would be given under the general maritime law "without regard to the court where he might ask relief." (*Idem*, 384.) In *Union Fish Co. v. Erickson*, 248 U. S. 308 (1918), the contract was for the employment of the master of a vessel for services to be performed principally on navigable waters. The contract was oral, and the statute of California (enacted like similar statutes in nearly all the states, after the pattern of the Statute of Charles II "For the Prevention of Frauds and Perjuries"), declared it void because it was oral. This Court held that the contract was maritime in nature and governed by the general maritime law, whereby it was valid, and held, affirming the Circuit Court of Appeals:

"If one State may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a State may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States."

Union Fish Co. v. Erickson, 248 U. S. 308, 314 (1918).

²⁰ This was a question of the effect of the maritime contract. *Schuede v. Zenith S. S. Co.*, 216 Fed. 566 cited in *Garrett v. McGore-McCormack Co.*, 317 U. S. 239, 244, N. 10.

It seems apparent that "the uniformity and consistency at which the Constitution aimed" by the admiralty clause is effectively defeated if a party may invoke state-made law to govern a maritime matter merely by suing in a state court. Section 9 of the Judiciary Act of 1789 (1 Stat. 76, 77), gave to District Courts of the United States exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."²²

This *Act of Congress* was argued to make state-made law decisive in actions on maritime contracts and torts brought in state courts. But it could not do that if the uniformity "aimed at" by the Constitution were to be maintained. Quoting this Act of Congress, this Court remarked that "different views have been entertained concerning it."²³ *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 383, *supra*. The Court referred to the *Jensen* case, and said:

"Concerning the extent to which the general maritime law may be changed, modified or affected by state legislation this was said: 'No such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper *harmony and uniformity* of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottawanna*' (21 Wall. 558, 575). Among such quotations

²² Since some of the cases herein referred to, this section has been changed slightly in verbiage, but not in intent, as the revisers' notes show; it is still "exclusive" federal jurisdiction. *Jansson v. Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950).

²³ Apparently referring to the dissents in the *Jensen* case, above cited.

is the following: 'One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.' " (Our emphasis.)

Chelentis v. Luckenbach S. S. Co., 247 U. S. at 381-382.

On that premise this Court turned to the Act of Congress above referred to, that saves to suitors in admiralty matters a right to a common law remedy, and said:

"Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

(*Ibid*, 247 U. S. on 384.)

In view of the constitutional premise it laid for this construction, it seems that the court was here observing its "cardinal rule" hereinafter referred to, to interpret acts of Congress in such a way as to avoid the conclusion of unconstitutionality.

Citing these cases, this Court held in *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259 (1922):

"The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common law court. *Chelentis v. Luckenbach S. S.*

Co., supra; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159.

"Here the trial court did not instruct the jury in consonance with these rules, and by failing so to do, fell into error."

It is apparent that *Erie R. R. v. Tompkins*, *supra*, and its undoubted principle that there is no general *common* law, has nothing to do with maritime contracts. There is a general maritime law, and the purpose of the Constitution is that it shall have *uniform* operation as to "all matters of admiralty and maritime jurisdiction." (Auth. cit.)

In *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (1942) the issue was the burden of proof upon the validity of a seaman's contract of release. The case was in the state court at common law, and was litigated, in the courts of the state, to the highest court of the state, all holding, under the law of the state, that the release was valid. The general maritime law has its own principles on the subject (just as it has with respect to the necessity of strict observance of express stipulations of a contract of marine insurance, see *Home Ins. Co. v. Ciconett*, 179 F.2d 892, 894 (CA 6, 1950) and auth. cit.). This Court reversed the state courts for failing to apply the general maritime law. *Erie R. R. v. Tompkins* was urged. The unanimous court held that the state was wrong to apply its own law, and in failing to apply the general maritime law, saying also:

"In many other cases this court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising under admiralty law."

Garrett v. Moore-McCormack Co., 317 U. S. 239, 244 (1942)—and cases cited.

Southern Pacific Co. v. Jensen, 244 U. S. 205, *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, and *Chelentis v.*

Luckenbach S. S. Co., 247 U. S. 372, among others (all above referred to) were cited.²⁴

The foundation principle of these cases (and many others) is that it is "unquestionable" that the Constitution referred to "*a system of law coextensive with, and operating uniformly in, the whole country.*" (Auth. cit.)

For these Constitutional reasons states are not permitted to apply their own laws to maritime matters, even in their own courts—it would defeat "*the uniformity aimed at by the Constitution.*" (Auth. cit.)

When the *Jensen* case was decided, Congress promptly seized on some of the language therein to enact, in substance, that state laws should apply to maritime contracts of the sort there involved, which had been held to fall within the Constitutional requirement. The Supreme Court held that to be beyond the power of Congress. (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.) Congress can, indeed, legislate to change the rules of the maritime law; but an attempt by Congress *to make state laws effective* in maritime matters not of a purely local nature, overlooks the *Constitutional reasons* why states are held powerless to change the general maritime law, namely, that the *Constitution* aimed at national *uniformity* of law in "matters of admiralty and maritime jurisdiction." (Auth. cit.) Uniformity is destroyed by giving state laws effect in the maritime field. Uniformity is just as much destroyed by an Act of Congress that says state laws shall be effective in the maritime field. The Constitutional reason that forbids the one, equally forbids the other.

The *Constitution* aimed at national uniformity in the general maritime law; the Constitution is just as binding on Congress as it is on the states. Congress could not, on its

²⁴ The express holding was (317 U.S. on 245) that the true meaning of *Erie R. R. v. Tompkins* is *not* to make State law dominant in the maritime field, *but* the precise contrary.

judgment of policy, make the diversity of state laws the rule in the maritime field; the *Constitution* inhibits that policy (Auth. cit.). This Court laid down the following premises:

“As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury, to characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters *and bring them within control of the Federal Government* was the fundamental purpose; and to *such* definite end Congress was empowered to legislate within *that* sphere.” (Our emphasis.)

(*Ibid*, 253 U. S. 149, 160.)

Rejecting the attempt to analogize power of Congress to validate state law under the *commerce* clause to the asserted power to validate state laws involving the *admiralty* clause, the Court said at page 161:

“The distinction between the indicated situation created by the Constitution relative to maritime affairs and one resulting from the mere grant of power to regulate commerce without more, should not be forgotten.”

(*Ibid*, 253 U. S. 161.)

Referring to cases in which Congress has, by its enactment under the *commerce* clause, validated state laws otherwise void, the court said further at page 166:

“Here, we are concerned with a wholly different constitutional provision—one which, *for the purpose*

of securing harmony and uniformity, prescribes a set of rules, empowers Congress to legislate to *that end*, and prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.” (Our emphasis.)

(*Ibid*, 253 U. S., 166.)

This was held in striking down an *Act of Congress* that purported to turn over to the states power to legislate in the maritime field.

This Court said at pages 163-164:

“And so construed, we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable *throughout every part of the Union*.” (Our emphasis.)

Ibid, 253 U. S. 163-164.

Assuming that Congress were entirely free in any matter arising under the *commerce* clause to say that diversity shall be the rule and state laws shall apply, can Congress use its powers of legislation, where the *admiralty* clause is concerned—powers vested in it by the Constitution to the end of securing harmony and uniformity throughout every part of the Union, for the diametrically opposite purpose of creating the exact confusion and uncertainty of state control which the framers of the Constitution both foresaw and undertook to prevent? In the *Knickerbocker* case, *supra*, this Court has answered that question in the negative.

The utter diversity of the insurance regulations of the several states is a familiar phenomenon, within the judicial knowledge of this Court. Petitioners avoid the impossible position that, to substitute those forty-eight clashing systems for the uniform maritime law would not work "material prejudice to the characteristic features of the general maritime law" or interfere with "the proper harmony and uniformity of that law in its international and interstate relations." Petitioners do not dispute the principle, but put forward the *McCarran Act*—which, according to the principle laid down by this Court in cases we have hereinabove referred to, would be void in the application they propose. For what Petitioners propose would bring about a confusion and disharmony with respect to a prominent and characteristic feature of the maritime law, the law of marine insurance, that would almost infinitely exceed any following upon the application in the maritime field of state workmen's compensation acts (*Knickerbocker Ice Co. v. Stewart* 253 U. S. 149) or state statutes of frauds (*Union Fish Co. v. Erickson*, 248 U. S. 308.)

Petitioners say that the *McCarran Act* has given the states power to regulate the business of insurance, *and that this includes the validity and effect of the terms of maritime contracts of insurance.* It seems evident under these authorities that, if the *McCarran Act* were so understood, to displace the general maritime law that governs marine insurance, with the 48 divergent legal systems of the states, it would be beyond the Constitutional powers of Congress. For, as held in the cases cited, the Constitution "aims at uniformity" in the maritime law, and it gives Congress the power to legislate in matters touching the maritime law to *that* end, not for the diametrically opposite end of creating the very confusion and uncertainty, namely, state control, which the framers of the Constitution both foresaw and undertook to prevent. To construe the powers

of Congress to include the validation of 48 sets of state laws in the maritime field of *marine contracts of insurance*, would be to say that Congress had power to defeat the purpose of uniformity and harmony which was the very object of its legislative powers in the field of the general maritime law, and to revive the very situation of diverse state control that the Constitution aimed to prevent.

Marine contracts of insurance are maritime contracts, and prime objects of the Constitutional purpose of uniformity. They are not at the fringe of the admiralty and maritime jurisdiction; again, there is no such argument. They are at the very heart of it. This Court has emphasized that marine insurance is a business having a "great field," and that there are "special reasons" why our law governing these maritime contracts should be kept consonant with English law. *Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487. As pointed out above, marine insurance contracts were held to be subject to the "Admiralty and maritime jurisdiction" of the Constitution with express and special reference to the apparent advantages of a uniform national system of law by Story, J. (*DeLovio v. Boit*, 2 Gall. 398; F. C. No. 3,776 at 443, *supra*.) This decision was emphatically approved by this Court, as above quoted, this Court saying, indeed, that marine contracts of insurance are plainly maritime contracts *because* in all their material rules and incidents they are derived from, and governed by, and part of the general maritime law. *Insurance Company v. Dunham*, 11 Wall. (78 U. S.) 1, 31, 34 (1870) *supra*.

It is held:

"The policy covered the vessel on navigable waters of the United States without as well as within the state of Texas. It was a maritime contract, and there-

fore governed by the general admiralty law and not by the law of Texas."

Actna Ins. Co. v. Houston Oil & Transport Co., 49 F.2d 121, 124 (CCA 5, 1931); cert. den. 284 U. S. 628 (1932.)

The ground of the decisions is that the Constitution aims at uniformity in this field. When Congress attempted to make state laws effective in that field, that was held to be beyond the powers of Congress, for the same reason—the Constitution aims at uniformity of the general maritime law, and Congress lacks power to defeat Constitutional aims. See *Knickerbocker Ice Co.*, *supra*. Petitioners say that by the *McCarran Act* Congress has again attempted to make state laws applicable in this maritime field. So understood, it would fall under the condemnation of the Constitution as construed by this Court, in the authorities cited; for the Constitution aims at uniformity in the general maritime law, of which the law of marine insurance is an integral part, and peculiarly subject to the Constitutional requirement of uniformity (Auth. cit.).

Petitioners ask this Court to overrule its decisions on the ground that by the *McCarran Act* Congress has now prescribed a rule of diversity in the maritime field for the effect of contracts of marine insurance. But it is settled that *the Constitution* prescribes uniformity of the general maritime law. How can *Congress* prescribe diversity, when the *Constitution* prescribes uniformity? The same Constitutional reason that dictated decision in the cases in which this Court rejected state law in this field, equally prevents any attempt by Congress to destroy the uniformity at which the Constitution aimed by legislating that the diverse laws of the states shall replace uniformity in that field. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. To overrule this settled doctrine would be revolutionary; this Court would

thereby have to reject the whole principle that the *Constitution* aims at the existence of a general maritime law. The Petitioners are asking a good deal.

The validity of the Constitutional objective of a uniform general maritime law finds striking illustration in the facts of this case. Here is a vessel in the state of Mississippi, and an insurer in the state of Illinois, who is asked to continue the existing coverage in favor of some new buyers resident elsewhere, for navigation of the vessel through many states, down the Mississippi River, up the Red River, and on Lake Texoma, which lies in two states. The facility with which the transaction was effected, and the low premium charge, would certainly have been impossible if the parties had been forced to figure out in advance, and at their peril, what a court would do with a complicated problem of the conflict of laws between the states, and what those laws at the moment might be as to all the problems presented by the contract. Under the authorities referred to, maritime transactions have not been encumbered with any such confusion and uncertainty. The authorities declare that it was a purpose of the Constitution, when the several states became a nation, that they should not be so encumbered. Under the doctrine settled by the authorities, including the decisions of this Court, the parties had a right to expect that they *could not* be so encumbered, and to contract on the basis of that constitutional assurance.

“The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts v. Camora*, 115 U. S. 353, 362.”

Union Fish Co. v. Erickson, 248 U. S. 308, 313 (*supra*).

They had a right, that is to say, to contract in the assurance that their contract would be binding as written, for that is the maritime law. (*Home Ins. Co. v. Ciconett*, 179 F. 2d 892, 894 (CA 6, 1950) collects cases.)

To reject the authority of all the cases, as Petitioners ask the Court to do, on the supposed ground that Congress has destroyed the uniformity aimed at by the *Constitution*, would instantly imperil every outstanding contract of marine insurance. Even more disastrous, the present uniform legal basis of marine underwriting would disappear. This is apparent from the history of the law of the subject shown by the foregoing authorities. Practices now uniform throughout the nation (indeed, throughout a large part of the civilized world) and based in some instances on decisions of the courts over "the last 300 years" (*Read v. Agricultural Ins. Co.*, 263 N.W. (Wis.) 632, 634) would become perilous overnight. The cost of writing and servicing marine policies would greatly increase, and premiums accordingly. The least serious consequence would be that the intended effect of every outstanding marine policy would be destroyed. The legal basis on which the business of marine insurance stands in its great field is the general maritime law (*Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487; *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. 2d 121 (CA 5, 1931) and to destroy the legal institutions on which a great business rests is to disorganize a whole section of the economy.

It would be ironical to find that result in the intention of the *McCarran Act*. For it is notorious, and spelled out in the report of the committee of Congress, that the whole purpose of the *McCarran Act* was to *avoid* the dislocation of the economy consequent on the overruling of established doctrine. The Act was passed, the Committee points out in response to the Supreme Court's decision in *U. S. v. Southeastern Underwriters Ass'n, et al.*, 322 U. S. 533, which, reinterpreting *Paul v. Virginia*, 8 Wall 168, held, for the first time, that insurance is interstate commerce. The Committee report, referring to the *Southeastern* case as

"precedent-smashing" (U. S. Code, Cong. Serv., 79th Cong. 1st Sess., 671) points out the confusion following on this upsetting of judicial doctrine. It was careful to say:

"It was *not* the intention of Congress to clothe the states with *any* power to regulate or tax the business of insurance beyond that which they *had been held to possess* prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." (Our emphasis.)

H. R. 143, 79th Cong. 1st Sess.; U. S. Code Cong. Serv., 671.

States had never been "held to possess" the power to impair the uniformity of maritime law with respect to marine insurance. On the contrary, they had been held not to possess it (Auth. cit.).

While the diverse and elaborate insurance codes of the states have sometimes left the courts to presume that they are meant to operate only within the Constitutional scope of state action, they, themselves, often warn against any interpretation that would exceed constitutional powers in the maritime field.²⁵

It would be ironical indeed to find in the *McCarran Act* itself "precedent smashing" intent to give the states power over marine insurance they never before were "held to possess." That would be to make the act the means of

²⁵ Thus the Texas code provision forbidding stipulations against mortgages, applies to companies mentioned "in this law," which are defined in terms of the nature of the risks they cover, the concluding clause of this defining section being an intent clause, explaining "the intent hereof" as being to cover "the shore end" of marine risks. (*Vernon's Texas Statutes*, 4880; *Texas Ins. Code*, Sec. 527.) The Illinois code, in a provision quoted below expressly excludes all policies of marine insurance. (Ill. Ins. Code, Smith Hurd Ill. Stat. ch. 73, § 766.) These exclusions are made for the reason that these are marine policies. *Lerine v. Aetna Ins. Co.*, 139 F. 2d 217, 218, commenting on like exclusions of marine policies from the Insurance Code of the State of New York.

creating, in the field of marine insurance, the confusions resulting from the reinterpretation of settled doctrine in another field that it was enacted to avoid.

If that were the necessary effect of the language of the act, that ironical consequence would be prevented by the Constitutional decisions above referred to, holding that national uniformity of the general maritime law, of which marine insurance is a part, is the Constitutional aim; and that therefore Congress *cannot* empower the states to defeat it (Auth. cit.). The act would be limited to its Constitutional objectives. These do not include the conferring on states of powers they were never held to possess before the *Southeastern* case, powers to substitute the diversity of State codes in the realm of maritime law for the constitutionally required uniformity "throughout the Union."

It does not seem, however, that the language of the *McCarran Act* requires any such result. The Act begins with a "Declaration of Policy" as follows:

"1011. *Declaration of Policy.*

"Congress declares that the *continued* regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." (Our emphasis.)

"1012. *Regulation by State Law; * * *.*

"(a) The business of insurance, and every person engaged therein shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

15 *United States Code*, Secs. 1011-1012.

The second section of the Act (on which, alone, Petitioners' argument travels) as to state power to regulate "the business of insurance" cannot be isolated from the first, for the second is an implementation of a policy expressed in the first, namely, that states shall "continue"

the regulation of "the business of insurance." That statutory intent cannot be applicable to the validity and effect of stipulations used in policies of marine insurance. In that field of marine insurance states never have regulated because they could not (Auth. cit.) and therefore they cannot "continue." For states, now, to start off exercising powers (which they never had "been held to possess") over marine insurance, would be inconsistent with the expressly declared policy which the Act was meant to implement, which is to "continue" what states had been doing in the exercise of powers they had been held to possess. The legislative history, above referred to, makes plain what Congress meant by the word "continue" in the statute, and the effect of this word as used in the declaration of policy upon the remainder of the Act, which was meant to implement that policy (*Ubi supra*).

To hold that the states under this Act can now make some new departure here (into the interpretation and effect of the terms of marine insurance policies) would be to say that Congress intended something that it took pains to say it did not intend.

This seems to be Petitioners' own understanding of the *McCarran Act*. In their brief to the Court of Appeals they say of the Act and the *Southeastern* decision: "This decision created a great deal of confusion * * *. It was as a consequence of the above decision that Congress in 1945 passed the *McCarran Act*, 15 U.S.C.A., Sec. 1011, heretofore quoted, placing the regulation of the insurance business in the states. *The legal effect of this Act is to leave the case at bar in the same position it would have been in had not the Supreme Court reversed itself in the Southeastern Underwriters case, Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946)," (App. Br. 16). *Knickerbocker Ice Co. v. Stewart*, for example, was decided in 1920

(253 U. S. 149), whereas *Southeastern* was not decided until 1944 (322 U. S. 533).

The foregoing admission by Petitioners themselves that the *McCarran Act*—in the light of its language, its explicit and well-known legislative history, and the authority construing it that they cite—is, precisely, a legislative act to undo the effect of the *Southeastern* case, seems well-nigh decisive. To undo *Southeastern* is not to undo *Knickerbocker*. To undo *Southeastern*, is certainly to deprive insurance of any protection it may have acquired thereby against state interference under the *commerce* clause. But, before *Southeastern*, when insurance had no such protection (since no insurance was regarded as commerce) the general maritime law which included as a characteristic feature the law of marine insurance was protected from state interference by the *admiralty* clause (Auth. cit.). When the *McCarran Act* took away from insurance the protection from state laws that *Southeastern* may have given it under the *commerce* clause, it took away a protection that the law of marine insurance never had. Notwithstanding insurance was not regarded as *commerce* after *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, the constitutional protection of the effect of policies of marine insurance from diverse state laws under the *admiralty* clause had been adequate. It remains adequate.

The reason Petitioners so admit (App. Br. 16. *supra*) that the true nature of the *McCarran Act* is to restore the legal situation before *Southeastern* (in which States could *not* change the law of marine insurance) may be that they fail to recognize that the *Southeastern* case was decided under the *commerce* clause, only, as examination thereof discloses; whereas it is equally apparent that the *Knickerbocker* case was decided under the *admiralty* clause.

“Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but *it cannot be made*

to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The Genesee Chief, 12 How. 452." (Our emphasis.)

The Belfast, 7 Wall. (U. S.) 624, 640.

One difference between these "entirely distinct things" is that *unlike the commerce clause*, the admiralty clause carries a requirement of national *uniformity*. That is the reason state-made laws are excluded. The same reason excludes any power in Congress to adopt or validate the diverse and inharmonious laws of the several states in the maritime field.

"The necessary consequence would be destruction of the very uniformity with respect to maritime matters which the Constitution was designed to establish;"

• • •

"The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 158, 161.

There is a further vital difference. When only the commerce clause is involved it is said that Congress may validate state laws otherwise void for the reason that it does *not* thereby turn back to the states legislative powers given only to Congress. As to the situation when only the commerce clause is involved, it is held:

"The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint." (Cit. auths.)

• • •

“Nor can Congress transfer legislative powers to a state * * *.

• • •

“Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws with respect to imported packages in their original condition, created by the absence of specific utterance on its part. *It imparted no power to the state not then possessed*, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * * This is not the case of a law enacted in the unauthorized exercise of a power confided to Congress, but *of a law which it was competent for the state to pass*, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress.” (Our emphasis.)

In re Rahrer, 140 U. S. 545.

(*Accord, Kentucky Whip & Collar Co. v. Illinois C.R. Co.*, 299 U. S. 334.)

This is the Constitutional theory invoked by the *McCar-ran Act* on the face of its declaration of policy (*Ubi supra*).

But this Constitutional theory which upholds Congressional validation of state laws, otherwise void, where only the commerce clause is involved, by avoiding surrender (without standards)²⁶ of Congressional legislative power to the states, is not available under the admiralty clause, in the maritime field. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149. The *admiralty* clause is a different provision.

“Here, we are concerned with a *wholly* different constitutional provision—one which, *for the purpose of securing harmony and uniformity*, prescribes a set of rules, empowers Congress to legislate to *that end*, and *prohibits* material interference by the States. (Our emphasis.)

(*Ibid*, 253 U. S. 166.)

²⁶ See *Field v. Clark*, 143 U. S. 649, cited in 253 U. S. 149, 164; and the cases in the line of *Field v. Clark*, such as *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421, 430.

If the *McCarran Act* were understood as intended so to apply to contracts of *marine* insurance, its obvious constitutional infirmities in that application would at once arise under the *admiralty* clause. The obstacle to state action in the maritime field does not arise from the action, or inaction, of Congress. It arises from the *Constitution* itself.

“The field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress. Unless this be true it is quite impossible to account for a multitude of adjudications by the admiralty courts. See *Workman v. New York City*, 179 U. S. 552, 557, *et seq.*

“The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten.”

(*Ibid*, 253 U. S. on 161.)

This Court’s expressions concerning the *McCarran Act* itself confirm this analysis and affirm the correctness of Petitioners’ admission—indeed, they doubtless account for the admission.

“But, though Congress had no power to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this *by removing obstacles to state action arising from its own action or by consenting to such laws*. H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to restrain it from any attack *under the commerce clause* to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.” (Our emphasis.)

Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 430-431.

The Court also said:

“Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of *other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress’ power*. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.” (Our emphasis.)

Prudential Ins. Co. v. Benjamin, 328 U. S. 408, 430.

It seems impossible to contend that the McCarran Act was intended to sustain state action against attack under the *admiralty* clause. The *McCarran Act* was certainly not a response to the *Knickerbocker* case. It was a response to the *Southeastern* case, to protect state action that might be invalidated under the *commerce* clause. In view of the above-quoted admission of Petitioners’ brief it does not seem that they feel able to dispute this. The *McCarran Act* was not aimed at *Knickerbocker*, which was the law before *Southeastern*. The *McCarran Act* was aimed at *Southeastern*. Its effect, Petitioners say, was to restore the legal situation as it existed before *Southeastern* (App. Br. 16). And the legal situation before *Southeastern* included *Knickerbocker*, and *Aetna*, and the other authorities above cited under the admiralty clause.

It seems plain that in the field of the general maritime law that includes marine insurance as a prominent and characteristic feature, Congress could not (if it would) restore the diversity of state control, when the central purpose of the admiralty clause was to give Congress the power in “all matters of admiralty and maritime jurisdiction” for the exact purpose of ending just that diversity (Auth. cit.). The point just made, however, is that Congress

never intended to exercise any such constitutionally forbidden powers by the *McCarran Act*. Reasons mentioned for so concluding are the language of the Act, its legislative history, the interpretation of it by the Supreme Court, and the admission of Petitioners as to its effect.

If more were needed, this construction seems almost mandatory in view of the cardinal rule that statutes will be construed to avoid not only the conclusion of unconstitutionality but even grave doubts thereof.

“* * * A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”

Panama R. R. Co. v. Johnson, 264 U. S. 375, 390.

In applying that principle in the case just cited, this Court rejected a construction sought to be put upon a statute “that finds support in some of its words” because “if it be so construed, a grave question would arise respecting its constitutional validity.” (*Ibid*, 264 U. S. 375, 390). The constitutional invalidity referred to, concerned some principles here involved. It was contended that an Act of Congress (the Jones Act) providing that an injured seaman “may, at his election, maintain an action for damages at law, with the right of trial by jury”, was void, because it proposed to enable a seaman asserting a cause of action essentially maritime to withdraw it at his election from the reach of the maritime law and to have it determined according to different systems of law. This Court, agreeing that words of the Act supported that meaning, rejected that interpretation, because of the “grave doubt” of the constitutionality of any such enactment.

Needless to say, the case is a further recognition of the negation imposed by the admiralty clause on any power in Congress to reintroduce into the admiralty field the confusions of diverse laws, and the incapacity of Con-

gress, upon its judgment of policy, to make diverse state laws effective in this field, when the exact opposite is the policy and requirement of the Constitution.

The further point is that the court avoided condemning the statute, by interpreting it, so as to give it a constitutional meaning. It was not difficult to sustain the right of Congress to make negligence at the seaman's election an available, uniform, national rule, in seamen's cases. Further language of the act, bearing on its grant of a right "to an action for damages at law" presented more difficulty. But, in view of the constitutional rule of construction mentioned, this Court held this to mean no more than the "saving to suitors" clause of the other act of Congress, as already construed (for the same constitutional reasons) in *Chelentis v. Luckenbach S. S. Co.*, *supra*—viz., to allow the seaman to sue in either a common law court or an admiralty court, but only under admiralty principles (*Ibid*).²⁷

Thus, a state statute saying that the rights and remedy granted thereby shall be "exclusive," will nevertheless be construed not to exclude admiralty rights and remedies for maritime torts, notwithstanding these fell within the broad language of the Act; thus saving the statute in its non-maritime applications. *Messel v. Foundation Company*, 274 U. S. 427.

"When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitu-

²⁷ The courts of the states, have, accordingly, entertained suits under the act, but have applied admiralty principles, whether the suit came to the state court under the "saving to suitors" clause of the Judicial Code construed in the *Chelentis* case, or under the Jones Act, construed in the *Panama R.R.* case.

"State courts, whether or not applying the Jones Act to actions arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles."

Garrett v. Moore-McCormack Co., 317 U. S. 239, 244.

tionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson*, 285 U. S. 22, 62."

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 348.

The cases cited show the force of this "cardinal principle" to construe statutes to arrive at a constitutional meaning, even when their words themselves would support an unconstitutional meaning, or a meaning that raised grave doubt of constitutionality. It seems to us as to the *McCarran Act*, that language, legislative history, judicial construction, and the admissions of Petitioners, point to the constitutional construction, which confines the act to a rejection of the effect of the *Southeastern Underwriters* case under the commerce clause in order to enable the "continuance" of the regulation states had theretofore engaged in upon the general understanding that insurance was not within the *commerce* clause—not extending at all to a new departure, the force and effect of the terms of policies of maritime insurance, in the exercise of powers that states had never been "held to possess prior to the decision of the Supreme Court in the *Southeastern Underwriters Association* case." (Committee Report, *supra*). Actually, this seems to be conceded. For Petitioners say: "The legal effect of this Act is to leave the case at bar in the same position it would have been in had not the Supreme Court reversed itself in the *Southeastern Underwriters* case, 372 U. S. 533." (App. Br. 16). In that position, states cannot annul the effect of the terms of policies of marine insurance. (Auth. cit.)

It seems apparent that the facts at bar involve, even more urgently than the facts of the earlier cases, the considerations emphasized in holding it to be beyond the power of Congress to give blanket approval to state legislation over a broad field of the maritime law.

Here is a case in which Petitioners argue that Texas has power to say, for example, that wherever the contract is made, stipulations in marine insurance policies, against mortgaging the vessel, without the insurer's consent—provisions that are valid and enforceable against others—shall be wholly void if the policy ever becomes payable to inhabitants of Texas. (Petition pp. 6, and 7 note "7," citing Vernon's Texas Statutes 4890, and 5054.) Provisions against encumbering insured property go to moral risk. *Sun Ins. Office v. Scott*, 284 U. S. 177. Putting local pride and prejudice aside, it seems impossible to say that all the assureds who inhabit one state are less likely to burn a vessel for the insurance than the inhabitants of any of the other 47 states. At least, whether such local preferences should exist seems not to have been thought by the authors of the Constitution to be an appropriate matter for local judgment; but Petitioners claim application for it here, and say this local preference is now backed by the will of Congress! *Apart from the Constitutional requirement of uniformity* there is a further Constitutional objection to the assertion that the legislative power of Congress in this field includes a power to indorse blindly anything that local prejudice may inspire. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, the Court said:

"Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution, as above indicated. The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations,

the latter may not be repealed, amended or changed except by legislation which embodies *both* the will and *deliberate judgment* of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning. *Moreover* such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant.” (Our emphasis.) *Ibid*, 164.

Aside from its fatal factual inaccuracies (*vide supra*), Petitioners’ presentation rests on what appear to be erroneous assumptions involved in statements which we quote therefrom:

First (Petition, p. 10): “Never before has an attempt been made to *extend the scope of general admiralty law* to include the regulation of the marine insurance business and thereby exclude state regulatory insurance statutes.” (Our emphasis)

From the time of *De Lovio v. Boit*, *supra*, the effect of the terms of a policy of marine insurance has been held under our Constitution to be a matter of “admiralty and maritime jurisdiction” with express and special reference to: “The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions.” (*De Lovio v. Boit*, 2 Gall. 398; F. C. No. 3, 776 at 443 (1815) *supra*.)

From *The Lottawanna*, 21 Wall. 558, 575, through *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244, N. 10 (1942) it has been held: “One thing, however, is unquestionable. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated

the uniformity and consistency at which the Constitution aimed," etc.

This has nothing to do with other questions, on which the general maritime law is silent, such as whether states may "regulate" the amount of surplus of companies doing such business (*Winter, Marine Insurance*, 22) or whether they should be mutual or stock companies (*Idem*, 24) or whether a corporation should be admitted into the state at all to do such business, as in such cases as *Hooper v. California*, 155 U. S. 648 and *Nutting v. Massachusetts*, 183 U. S. 553, cited by Petitioners; or whether they shall conspire to restrain trade (The McCarran Act). These are not matters covered by the general maritime law. As the Court of Appeals remarked, "if more need be said, the *Hooper* case does not involve a conflict between state law and the law of admiralty," etc. (R. 283.) Appellants overlook, in citing Winter's handbook on "*Marine Insurance*" this passage which we quote therefrom (3rd. Ed. p. 20):

"In the year 1756 the Earl of Mansfield ascended the bench as Lord Chief Justice of England, and for 32 years thereafter he molded and clarified English law. Of broad knowledge and keen intellect, he took insurance law as he found it, both in the English precedents and in the Continental codes, applied it in the light of commercial customs and usages to the cases presented to him, and developed a *body of law which is today the basis of both British and American practice.*" (Our emphasis)

Petitioners' above quoted statement, to the effect that the result of the Court of Appeals was one reached "never before" (Petition, p. 10) is the reverse of the truth. The fact is obvious from the decisions, including the decisions of this Court, that to substitute the diverse and clashing codes of the states for the substantive maritime law on which the marine insurance business rests and has rested for centuries in its "great field," would not only deprive

the parties to this and every outstanding policy of marine insurance of the benefits of the law with reference to which they contracted, but destroy the legal institutions on which a whole section of the economy is founded under our Constitution.

Second: Petitioners say (Petition, p. 10) that it is characteristic of admiralty law that "the regulation of the marine insurance business" (*sic.*) be left to "legislative bodies and not to the judicial branch of the government." What has already been said is, perhaps, an adequate commentary on that statement. We are here concerned with the effect of the terms of a policy of marine insurance, which is the nationally uniform admiralty or maritime law, pure and simple. (Auth. cit.) Nothing was further from the intent of Congress when the McCarran Act was passed than to affect it in any way. In any case, the "definite object" of the admiralty clause of the Federal Constitution:

"* * * was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.

"Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. * * * To say that because Congress could have enacted * * * it could authorize the states to do so as they might desire, is false reasoning. *Moreover* such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would defeat the very purpose of the grant."

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 164 (*supra*).

Third: Petitioners (p. 10) attribute the growth of the American marine insurance to state regulation! On the contrary, if American underwriters of vessels, which necessarily go from state to state in the performance of their ordinary and historic function, were now, after more than 150 years, to be confronted with 48 clashing systems of law as to the effect of their contracts, including 48 systems of the law of conflicts—"the unnecessary burdens and disadvantages of discordant legislation"—we should have lost precisely the "advantages resulting" from "a uniformity of rules and decisions" that were in view under the Constitutional grant, and that were emphasized in holding marine insurance to be a matter of "admiralty and maritime jurisdiction" under that grant. *De Lovio v. Boit*, 2 Gall. 398; Fed. Cas. No. 3,776, 443 (1815) *supra*. If Petitioners' above-quoted statement is meant to suggest that the effect of the terms of marine policies *has been* anything but the uniform, general maritime law, they are mistaken as to the fact. (Auth. cit.) If they mean to prophesy, in the teeth of experience, that diversity of law on *that* subject *would be* a good thing for the national community, they differ from the authors of the Constitution and from Holmes, J. and Story, J., to mention no others. (Auth. cit.) Indeed, we have been moved to treat these matters thus fully largely because of the catastrophe to maritime law, including the law of marine insurance, that would follow the abandonment of the advantage of our Federal Constitution, as Petitioners at this late date would suggest.

In view of what has been said, perhaps the inappositeness of Petitioners' further comment is sufficiently emphasized. Possibly we should add that there is no unconstitutional "discrimination" (Petition p. 11) in setting apart national matters for uniform, federal control, from local matters for diverse state control; that would make the Constitution itself unconstitutional. Nor did the Court of Appeals an-

nounce any different principle in *Cushing v. Maryland Casualty Co.*, 198 F. (2d) 536 (whether or not it there correctly applied it) for the principle it there accepts is stated in the language of Mr. Justice Brandeis' opinion deciding *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109,²⁸ and is as follows:

"The right of a common law remedy does not * * * include attempted changes by the state in the substantive admiralty law" etc. (*Red Cross Line v. Atlantic Fruit Co.*, *supra*, as quoted in *Cushing v. Maryland Casualty Co.*, 198 F. (2d) 536, on 538.)

The *Cushing* case is cited for that principle in the opinion below. (R. 283.) The principle is obviously necessary if substantive admiralty law is not to disappear in diverse state-made rules. "Controversy over cases in the Jensen line has not extended to this principle." *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244 N. 10, and *cas. cit.* (1942). And the validity and effect of the terms of a marine insurance policy is substantive admiralty law, if anything is. (*Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870), *supra*; *De Lovio v. Boit*, 2 Gall. 398; Fed. Cas. No. 2776, at 443 (1815) *supra*.)

The corollary stated by the Court of Appeals in a former decision that: "When a cause of action in admiralty is asserted in a court of law its substance is unchanged" (*Panama Agencies v. Franco*, 111 F. (2d) 263, 266), was quoted with approval by this Court (as a summation of the effect of this Court's decisions in *Chelentis v. Luckenbach S.S. Co.*, 247 U. S. 372 and *Panama R. Co. v. Johnson*, 264 U. S. 375, there cited, and cited above), in *Seas Shipping Co. v. Sicracki*, 328 U. S. 85, 89, N. 5. A cause of action on

²⁸ The decision in that case was:

"New York, therefore, had the power to confer upon its courts the authority to compel parties within their jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law," etc. (*Idem*, 124)

a marine insurance policy is a cause of action in admiralty, if there ever was one. (*DeLovio v. Boit, supra*; *Ins. Co. v. Dunham, supra*.) The Court of Appeals was on familiar ground when it held: "A cause of action on a marine insurance policy is a cause of action in admiralty and when it is asserted in a court of law its substance is unchanged."²⁹ (R. 282.)

The Petition makes no argument of ambiguity. It raises no question whatever as to the desirability of the rule of the general maritime law, that the terms of marine policies are enforced as they are written, and that their violation precludes recovery on the familiar principle that no man can recover on a contract he has broken. (*Home Ins. Co. v. Ciconett*, 129 F. (2d) 892, and auth. cit.)

This underwriter was in Chicago when this vessel sank in Oklahoma as the result of being "burned by fire" (Stipulation, R. 41) during the small hours of the night while apparently deserted and moored a little further off-shore than its usual berth. Contractual provisions of the policy, such as those here against pledge or sale of the insured interest, which underwriting experience has shown go to the moral hazard (Dep. White 10, 11), *Sun Insurance Office v. Scott*, 289 U. S. 177 (1931) are the marine underwriter's protection, and, as a practical matter, usually his only protection, against the assured's carelessness and fraud. They profoundly affect the nature of the risk. (See Plaintiffs' Exh. 2, R. 255.)

²⁹ We are not sure that the Petition means to suggest any difference on this point between maritime contracts and maritime torts. The suggestion would be frivolous (Auth. cit.); and see *Jansson v. Swedish American Line*, 185 F. (2d) 212 (CA 1, 1950) and cas. cit.

III.

This was not a Texas contract.

As pointed out, this was a maritime contract, derived from and governed by the general maritime law.

If the uniform maritime law did not govern maritime contracts and state laws did, the first troublesome question would be—which state?

Petitioners stipulate they broke this contract (R. 40-43); they want to make it a Texas contract, arguing that under the law of Texas they were free to break it and still recover thereon.

But even if this were not a maritime contract governed by the general admiralty or maritime law, it still would not be a Texas contract.

We have heretofore pointed out that this insurance contract was made, completed and delivered in the State of Illinois.

The policy lists the following offices of the defendant—Chicago, New York, and California (R. 233, 252.) Certainly, the contract does not show an intent that it shall not be performed in Illinois where it was made, unless, under the Maritime law (which Petitioners say does not govern), its coverage of the vessel on navigable waters of the United States in many states may be called performance. Proofs of loss were to be furnished outside Texas (*vide supra*; see *Hartford Ind. Co. v. Delta Co.*, 292 U. S. 143, 149-150) and the warranty confining use to private pleasure purposes only, required performance wherever the vessel went. The vessel was in Oklahoma when the loss occurred.³⁰

³⁰ For the Oklahoma law, see *Brown v. Connecticut Fire Insurance Co.*, 153 Pac. 173 (Okla.)

The Texas law is that the place of performance is presumed to be the place of making when the policy does not fix performance in some other place. (*Fidelity Mutual Life Association v. Harris*, 94 Tex. 25, 35; 57 S. W. 635, 638:

“The place of performance is to be regarded as the same as that at which the contract is made, unless it is to be gathered from the agreement that a different one was fixed.” (*Ibid.*)

The law of Illinois is that a contract to be performed in several states is governed by the law of the place where it was made. *Oakes v. Chicago Fire Brick Co.*, 388 Ill. 474, 479; 58 N. E. 2d 460 (1945); *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, 263 (1873).

The contract was negotiated, made, and delivered in the State of Illinois. (*Vide supra*)

The vessel which was the subject matter of the coverage was in many states. (R. 97, 106, 119, 120.) From Greenville, it navigated down the Mississippi River, up the Red River, and on Lake Texoma, which lies in two states. (R. 120.) Physically, most of the lake is in Oklahoma. (R. 120, 152.) It can be navigated to a limited extent in Texas. (R. 120, 152.) The regular berth of the vessel was in Oklahoma. (R. 97, 106, 119, 120.) Sometimes she crossed the Oklahoma-Texas line in navigating from her home berth at Burns Run resort in Oklahoma and returning thereto. (R. 120.) For the temporary purpose of repairs she was sometimes on the Texas side of these navigable waters of the United States. (R. 106, 144, 153.)

Originally owned by Marshall and Shuler, the vessel was then owned for a time by Wilburn Brothers, who Petitioners say, *all* lived in Denison, Texas, although they neglected really to prove that allegation as to all of them. But

when the loss occurred, and for some time theretofore, the entire legal and equitable title of the vessel was owned by a citizen of Oklahoma, an Oklahoma corporation not authorized to do business in Texas. (R. 43.)

After the loss, demands for payment were pressed upon H. H. Cleaveland Agency of Rock Island, Illinois, who forwarded these demands from Rock Island to defendant in Chicago. (Dep. Rossow Exs. 40, 41, 42, 43, 46-48). Proof of loss was sent by McKinney to H. H. Cleaveland Agency in Rock Island and also to defendant office in Chicago. (Dep. Rossow Ex. 49)

Petitioners' sole reliance is upon a Texas statute³² which says that an insurance policy payable to an inhabitant of Texas shall be governed by Texas law. *Vernon's Texas Statutes*, Sec. 5054. Therefore, they contend, that no matter where the contract was made or where it was to be performed—regardless of the fact that the vessel was in Mississippi when the coverage attached, and, afterwards, in many states; no matter if the vessel was only rarely and transiently in Texas (or never in Texas); no matter if its regular berth was in Oklahoma and it was lost there while owned by a citizen of Oklahoma, the Court is permitted to regard only the circumstance that the policy was payable to the Wilburn brothers.³³ The power of the state under the Fourteenth Amendment to the Federal Constitution to make its laws applicable to a contract on the sole ground that one of the parties is a citizen of the state is denied by this Court. (*Hartford Indemnity Co. v. Delta Co.*, 292 U. S. 143; *Fidelity and Deposit Co. v. Tafoya*, 270 U. S. 426.)

³² Petitioners lack the temerity to quote this statute, but cite it in a footnote, Petition, p. 7, note 7.

³³ Actually, Petitioners failed to prove that all three of the Wilburn Brothers to whom the contract eventually ran were citizens or inhabitants of Texas when the coverage attached.

Incidentally, the Texas courts have not construed this statute as Petitioners wish to have this Court read it. In a recent Texas case, a citizen and inhabitant of Texas sued an Illinois insurance corporation licensed to do business in Texas on a policy of insurance issued in California pursuant to an application received in California. The Texas Court held:

“[1] It will be observed that no part of the transaction leading up to the consummation of the original contract, or to the reinstatement thereof, or to the maturity of any right accruing thereunder, occurred or transpired within the State of Texas. Under the terms of the policy the insured was given the right to have the beneficiary changed at any time upon request, irrespective of the place of residence of such beneficiary. Clearly, the contract was not in fact made or entered into with reference to the laws of Texas or because of any Texas license or permit issued to appellant. Consequently, we do not think the provisions of Art. 5054 of Vernon's Tex. Civ. Stats. require or authorize the courts to hold that the contract sued upon was in legal contemplation made and entered into under and by virtue of the laws of Texas relating to insurance merely because appellant was in fact doing other business as an insurance company within this state, even though the proceeds from the policy were to become payable to some person whose residence might be within this state. After carefully considering the undisputed evidence in the light of the authorities cited by the respective parties, we have concluded that the validity, interpretation and obligations of the contract in suit must be determined and controlled by the laws of California and not by the laws of Texas, insofar as the laws of the former state may be shown to be different from the laws of the latter.”

Washington Nat. Ins. Co. v. Shaw, 180 S. W. 2d 1003, 1004 (Tex. Civ. App. 1944).

It would thus appear that the Texas courts, in construing this statute, still treat it as a question of fact whether an insurance policy payable to an inhabitant of Texas is, or is

not, a Texas contract; and, since the literal test of the Act based on a Texas habitation by the payee is rejected, the Texas courts read the statute according to the doctrine of *Fidelity Mutual Life Association v. Harris*, 94 Tex. 25, 57 S. W. 635, 638, *supra*, and *Hartford Ind. Co. v. Delta Co.*, 292 U. S. 143, *supra*. See accord: *Metropolitan Life Ins. Co. v. Greene*, 93 S. W. 2d 1241, 1245 (Tex. Civ. App.).

Accordingly, even if the *McCarran Act* were applied, and were valid in that application, the question "which state?" that would then arise could not be answered in favor of the law of Texas to govern this Illinois transaction, without transgressing constitutional restraints imposed by the Fourteenth Amendment on the power of states to give their laws extra-territorial effect (nor without overriding the construction Texas courts have given this Texas statute, a construction which begins by tacitly rejecting the unconstitutional test of a Texas habitation by the payee as the circumstance to determine what law shall govern an insurance contract).

Beyond all these considerations is the fact that the result for which Petitioners contend is not within the intent of the *McCarran Act*. By that Act Congress had no intent to empower states to give their laws extra-territorial effect contrary to the ideas entertained by Congress of the restraints imposed by the Fourteenth Amendment. The report of the committee on the *McCarran Act* seems perfectly clear:

"Briefly, your committee is of the opinion that we should provide for the continued (sic) regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 364; and, *Connecticut General Insurance Co. v. Johnson*,

303 U. S. 77, which hold, *inter alia*, that a state does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resided or domiciled therein, covering risks within the state, or to regulate such transactions in any way." (H. R. 143, *U. S. Code Congressional Service*, 79th Cong. 1st Sess.; pps. 671, 672.)

When it is remembered that this contract was made in Illinois, that this risk did not have Texas *situs*, and that when the loss occurred the entire legal and equitable title to the property was owned by an Oklahoma corporation, it would be to flout the intent of the *McCarran Act* all over again to say that its intent is to subject this transaction to Texas law.

Obviously, Congress considered that it would be, also, to flout the Constitution. We agree; and so contend.

IV.

Petitioners' many breaches barred recovery.

Petitioners stipulated that they violated this contract. They seek to find a law that will permit them to violate the contract and still recover on it.

The general Maritime Law would not allow that; there is no such argument. The rule is stated by the Court of Appeals with ample citation of authority (R. 280) and Petitioners do not deny it here.

In *Fidelity-Phenix Insurance Co. v. Chicago Title and Trust Co.*, 12 F. 2d 573, 574 (CCA 7), for example, the Court said:

"The principal defense is a breach of the warranty that the steamer was a passenger steamer. In the view we take of this question it will not be necessary to notice other contentions. The rule is that a breach of an express warranty in a policy of insurance bars a

recovery whether it caused the injury or not. Arnould on Marine Insurance and Average (10th Ed.) vol. 2 §§ 632, 633; 38 Corpus Juris, p. 1064."

The Court said further on the same page:

" 'The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms. * * * The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery.' *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231; *McLoon v. Commercial Mutual Ins. Co.*, 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129."

(See accord, *Home Insurance Co. v. Ciconett*, 179 F. (2d) 892, quoted by the Court of Appeals at R. 280-281, and auth. cit.)

This rule, as stated in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, cited in the foregoing maritime cases (if not actually borrowed from the maritime law by the common law) is also the common law of Texas (*Fidelity Mutual Life Association v. Harris*, 94 Texas 25, 57 S. W. 635, 637; *Lozano v. Palatine Ins. Co.*, 78 Fed. 278 (CA 5, 1896)) and of Illinois (*Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334, 341, 346; 68 N. E. 551) as well as the general Maritime Law. (*Vide supra*.)

In *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, violation of the policy provision there in question did not cause the loss; and the provision did not describe itself as a warranty, that word not being used, but it was an express provision and was treated as a warranty,³⁴ compliance with which was a condition of recovery, for it expressly stated that if it was not complied with, the policy

³⁴ "No particular form of words is necessary to constitute an express warranty. It may be in any form of words from which an intent to warrant may be inferred." Arnould on Marine Insurance, 1939, 12th Ed., Sec. 630.

should be void. (Compare certain like provisions of this policy, *supra*.)

The lower court had permitted recovery because the violation did not increase the risk—and this Court reversed that, holding, precisely, that the provision had to be complied with as a matter of contract, whether it increased the risk or not. This Court said on page 464:

“The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk.”

This Court said further (151 U. S. on 462):

“Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery.”

The law of Illinois (Sec. 766 *Ill. Rev. Stat.* 1949 ed.; *Ill. Ins. Code* (1937) Sec. 154) where this contract was made, leaves it to be governed by the maritime law:

“No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a

policy of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. *This section shall not apply to policies of marine or transportation insurance.* (Our emphasis.)

It is for this reason that the Petition is so silent concerning any conflict whatever between the general Maritime Law and the law of Illinois. (*Vide supra*, Point I) ³⁵

The Court of Appeals held the maritime law governed this maritime contract and said "the state law is inapplicable whatever it may be and we need not and do not decide whether, as appellee vigorously and persuasively insists, the Texas statutes as construed by the Texas courts have no application to the present situation." (R. 283)

Even if there were no such thing as a maritime clause in the Constitution, federal reasons of due process under the XIVth Amendment forbid any application of Texas law to this situation, arising out of a contract made in Illinois.

However incidental it may be for present purposes it is also true that in construing the Texas statutes relied on by Petitioners, the Texas courts themselves here observe the prohibition of the XIVth Amendment against extra-territorial effect of this state legislation (*Washington National Ins. Co. v. Shaw*, 180 S. W. (2d) 1003, 1004

³⁵ For the Illinois common law, see *Norwaysz v. Thuringia Insurance Company*, 204 Ill. 334, 341, 346; 68 N.E. 551 (citing and following *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452).

(Tex. Civ. App. 1944) *supra*; *Fidelity Mutual Life Association v. Harris*, 94 Texas 25, 57 S. W. 635; *Metropolitan Life Ins. Co. v. Greene*, 93 S. W. (2d) 1241, 1245 (Tex. Civ. App.,)—and that even as to a Texas contract, the Texas courts would enforce, just as they are written, at least some of the provisions that Petitioners stipulate they violated. (*Vide supra*.) As the Court of Appeals remarked, “one breach is sufficient.” (R. 281) Petitioners point to no Texas statute outlawing stipulations against sale of the assured interest, or against commercial use,³⁶ or against false representations or concealments.³⁷

³⁶ Petitioners made an argument to the Court of Appeals of waiver of the condition against commercial use under the admiralty law and the law of Texas (R. 279), which, notwithstanding it was not in the case on the pleadings (*Vide supra*), was decided adversely to them by that Court (R. 281). The Petition brings forward no question of the correctness of that ruling.

³⁷ See *Cohen, Friedlander & Martin Co. v. Mass. Mut. Life*, 166 F. (2d) 63 (CA 6, 1948); cert. den. 334 U. S. 820; *Btesh et al. v. Royal Ins. Co., Ltd.*, 40 F. (2d) 659 (S. D. N. Y.); aff'd. 49 F. (2d) 720 (1931); *Hargrove v. Ins. Co.*, 125 F. (2d) 225 (CA 10, 1942); *Clafin v Insurance Co.*, 110 U. S. 81.

CONCLUSION

It is submitted that the Petition should be denied; for

(1). It wholly fails even to suggest any conflict between the general maritime law, and the law of Illinois (which would govern this contract if there were no such thing as the general maritime law, and which equally forbids recovery in the teeth of the many stipulated violations of the plain terms of the contract);

(2). The general maritime law forbids recovery under such circumstances and this was a maritime contract governed by that law;

(3). The law of Oklahoma, where the vessel was lost, and concerning which the Petition is also silent would also forbid recovery;

(4). The sole question argued by the Petition, of alleged conflict between the general maritime law and the law of Texas, is moot. But even the law of Texas would not permit recovery here in view of all Petitioners' admitted breaches; nor would it even treat this as a Texas contract.

Respectfully submitted,

EDWARD B. HAYES,

Attorney for Respondent.

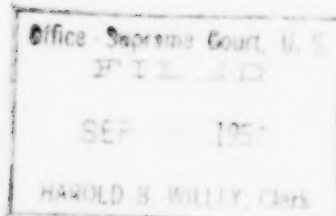
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954.

No. 7

WILBURN BOAT COMPANY, et al.,
Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

**REASONS FOR WITHHOLDING CONSENT TO BRIEF
AMICUS CURIAE.**

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135 South La Salle Street,
Chicago 4, Illinois,
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Respondent.

**REASONS FOR WITHHOLDING CONSENT TO BRIEF
AMICUS CURIAE.**

Pursuant to Rule 42(3), Respondent now states concisely "reasons for withholding consent" to the Motion of Messrs. Stephen V. Carey, Samuel G. Bassett and John Geisness for leave to file a brief *amicus curiae* in the above-entitled cause.

1. The application does not comply with Rule 42(2) of this Court.¹

¹ "A brief of an *amicus curiae* in cases before the court on the merits may be filed only after an order of the court or when accompanied by consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported." (Emphasis supplied)

Revised Rules of the Supreme Court of the United States,

adopted April 12, 1954, effective July 1, 1954, Rule 42(2)

Admittedly it was not presented within the time allowed for the filing of the brief of the parties supported (application, P. 2). The appli-

2. The application fails to satisfy Rule 42(3) of this Court, in that it sets forth no questions of fact or law that have not been (nor any reasons for believing they will not be) adequately presented by the parties. The application states (emphasis supplied):

"Petitioner's brief no doubt covers the question, but, nevertheless, we believe that to a degree (sic) it may obscure the vital constitutional question by discussion of details relative to the Texas statute. Moreover several decisions not cited may have a controlling influence. We refer particularly to the decision of Mr. Chief Justice Hughes in Detroit Trust Company, Trustee v. Steamer Thomas Barlum, October Term 1934, 293 U. S. 21, 79 L. Ed. 176, sustaining the Preferred Ship Mortgage Act of 1920, a radical departure from pre-existing maritime law. There are several other decisions which it would be improper to discuss at length now."

Contrary to the statement so made the decision so referred to is cited, in our Brief in Reply to Petition for Certiorari, at pages 37 and 40. No "other decisions" are named, nor is their doctrine stated.

The constitutional validity of statutes is not obscured by discussion of their details, precise application on the very facts of the very statute being of the essence of any

¹ (Cont'd.)

cants attempt to excuse their delay by asserting that they are recently in receipt of an opinion of an appellate court of the State of Washington, allegedly involving a question similar to that involved here. It affirmatively appears, however, from the application (pages 1 and 2 thereof) that the trial court had first passed on the question in which the applicants assert an interest. They fail to show that they have any different interest now than they had when the Washington trial court acted or while that case was pending on appeal. There is no showing that the question which the applicants now seek to present to this Court was not available to them in ample time to present their application in compliance with this Court's rules.

helpful discussion of constitutional questions. Nor is it made to appear that the California statute with which applicants are concerned is "substantially comparable" to the Texas statutes relied on by Petitioners, nor is it.

3. The application states that respondent neither unequivocally gives nor refuses consent to the filing of a brief *amicus curiae*. Respondent was first requested to give such consent by telegram of September 14, 1954 (copied in Petition for Leave to File at pages 4 and 5, "Appendix" thereof). Respondent did refuse to give its consent on the ground that the application did not comply with this Court Rules 42(2) and 42(3).²

The applicant so interpreted respondent's action.³ Ap-

² Respondent's telegram reads:

"Chicago, Illinois, Sept. 15, 1954

"BASSETT, GEISNESS & VANCE
New World Life Building
Seattle, Washington

Reurtel of yesterday afternoon. Please refer to Rule 42 U. S. Supreme Court effective July 1st last. Petitioner's brief on the merits was filed August 25th last when the time therefor expired. Apparently the court will not receive a new-brief on that side now from a stranger to the cause. The case is set for argument in a few weeks, which may illustrate the occasion for the rule forbidding an *Amicus Curiae* brief after time has expired for the brief of the party sought to be supported thereby. In any event since my consent would be ineffective under the Supreme Court's rule I should appreciate it if you would withdraw your request for it.

EDWARD B. HAYES."

³ Applicant's reply to respondent's telegram reads:

"Seattle, Washington
September 15, 1954

"EDWARD B. HAYES
Attorney at Law
123 South LaSalle
Chicago, Illinois

Familiar with rule. We interpret your telegram fifteenth as refusing our request of fourteenth. If incorrect please advise.

BASSETT, GEISNESS & VANCE"

plicants were not advised that their earlier interpretation was incorrect. It was, and is, correct.

Applicants admit failure of "literal compliance with Rule 42 of this Court." There has been no compliance, literal or otherwise. In view of the above circumstances it would be an unwarranted hardship and not conducive to the presentation of this cause in a manner calculated to its proper consideration to confront the parties and the Court with another brief, supposedly on the merits, at this late date. The considerations appearing to underlie Rules 42(2) and 42(3) are believed to be particularly applicable.

Respectfully submitted,

FIREMAN'S FUND INSURANCE COMPANY,
Respondent

Edward B. Hayes
Its Attorney

CERTIFICATE OF SERVICE.

I DO HEREBY CERTIFY that the foregoing Reasons for Withholding Consent to Brief *Amicus Curiae* was served on attorneys for applicants, Stephen V. Carey, Samuel B. Bassett and John Geisness at their office 811 New World Life Building, Seattle 4, Washington, by depositing a copy of said Reasons in the United States Post Office at Chicago, Illinois, on the 24th day of September, 1954, with airmail postage prepaid.

EDWARD B. HAYES

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HAROLD B. WILLEY, Clerk

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Brief for the Respondent

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Benedict on Admiralty, 6th ed., Sec. 110a, 324	29

IN THE
Supreme Court of the United States

OCTOBER TERM, A.D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,

Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

Brief for the Respondent

OPINION BELOW

The opinion of the Court of Appeals is reported at 201 F.(2d) 833 and printed in the record at 199-206. The opinion of the District Court is unreported but is reprinted in the record at 19-20.

JURISDICTION

The judgment of the Court of Appeals affirming the District Court's judgment in favor of Respondent (defendant below) was entered on January 29, 1953. A petition for a writ of certiorari was filed on April 29, 1953, and was granted on April 26, 1954. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

I.

Is a typical policy of marine insurance underwritten between widely separated parties in peculiar reliance on the statements of assured by their agent and covering the hull of a distant vessel against full marine risks on the navigable waters of the United States in several states a maritime contract, derived from and governed by the substantive general maritime law?

II.

Has a state power to change the validity and effect of material terms as they are written in a maritime contract and strictly enforced by the general maritime law, and specifically, warranties of the assured in a marine insurance policy going to the physical and moral risk on the hull of a navigating vessel against sale, pledge, and commercial use of the vessel, and, especially, by annulling such terms; or, by requiring one party to the maritime contract to show some further fact, irrelevant alike to its terms as written and its obligation under the general maritime law, and to sustain the burden of proving such further fact before permitting reliance on the terms of the maritime contract as written and as strictly enforced by the general maritime law; and does such change take the right of the party relying on the terms of the maritime contract as written and as strictly enforced by the general maritime law, to have the validity and effect of its terms governed by the substantive general maritime law under Art. III, Section 2 of the Constitution of the United States?

III.

Was it the intent and effect of the McCarran Act to return to the states a general power assigned by Constitution Art. III, Section 2, to the Federal sovereign to change the substantive general maritime law governing contracts of marine insurance; and, if so, is the McCarran Act valid in that application?

IV.

Does a presumption of correctness attend the judgment (which was dismissal), and, if so, have Petitioners shown any applicable law whereby dismissal was wrong?

V.

Can Texas law be applied to determine the validity and force of this contract without depriving Respondent of due process under the Constitution, Article XIV (Amendment)?

VI.

Would Texas law require any different judgment than was entered?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article III, Section 2—UNITED STATES CONSTITUTION

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *, to all Cases of admiralty and maritime jurisdiction; * * *

Article XIV—AMENDMENT TO THE UNITED STATES CONSTITUTION SECTION 1

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Article VI—UNITED STATES CONSTITUTION

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Title 15—UNITED STATES CODE, Chapter 20, “Regulation of insurance” 15 USC 1011-1015. (The McCarron Act)

15 USC 1011—“*Declaration of policy.*”

“Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”

15 USC 1012—“*Regulation by State Law; Federal law relating specifically to insurance; applicability of Certain Federal laws after June 30, 1948.*”

“(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”

“(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance; * * *.”

15 USC 1014—*Applicability of Merchant Marine Act of 1920.*

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the * * * Act of June 5, 1920, known as the Merchant Marine Act, 1920.

28 USC 1333—*Admiralty, Maritime and Prize Cases*

“The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”

Illinois Revised Statutes, 1949, Chapter 73, Sec. 766 (Illinois Insurance Code, 1937, § 154 entitled “Misrepresentation and Warranties.”)

“No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy

of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. This section shall not apply to policies of marine or transportation insurance."

Oklahoma Statutes, 1951—Chapter 36, Sec. 2 (in material part);

"All contracts of insurance on property, lives or interests in this State shall be deemed to be made therein."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936, Article 5054, entitled "*Texas Laws Govern Policies*" (Art. 21.42 of 1951 Texas Insurance Code)

"Any Contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same."

VERNON'S TEXAS STATUTES—Revised Civil Statutes, 1936, Article 4880 entitled "*No Company Exempt.*"

"Every fire insurance company, every marine insurance company, every fire marine insurance company, every

fire and tornado insurance company, and each and every insurance company of every kind and name issuing a contract or policy of insurance, or contracts or policies of insurance against loss by fire on property within this State, whether such property be fixed or movable, stationary or in transit, or whether such property is consigned or billed for shipment within or beyond the boundary of this State or to some foreign county (sic), whether such company is organized under the laws of this State or under the laws of any other state, territory or possession of the United States, or foreign country, or by authority of the Federal Government, now holding certificate of authority to transact business in this State, shall be deemed to have accepted such certificate and to transact business thereunder, upon condition that it consents to the terms and provisions of this subchapter and that it agrees to transact business in this State, subject thereto; it being intended that every contract or policy of insurance against the hazard of fire shall be issued in accordance with the terms and provisions of this subchapter, and the company issuing the same governed thereby, regardless of the kind and character of such property and whether the same is fixed or movable, stationary or in transit, including the shore end of all marine risks insured against loss by fire."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936, Article 4890—entitled "*Lien on Insured Property*" (1951 Texas Insurance Code, Art. 5.37)

"Any provision in any policy of insurance issued by any company subject to the provision of this law to the effect that if said property shall be encumbered by a lien of any character or shall after the issuance of such policy become encumbered by a lien of any character then such encumbrance shall render such policy void and shall be of no force and effect. Any such provision within or placed upon any such policy shall be null and void."

VERNON'S TEXAS STATUTES—Revised Civil Statutes 1936,
Article 4930, entitled “*Breach by Insured*” (1951 Texas
Insurance Code Art. 6.14)

“No breach or violation by the insured of any warranty, condition or provision of any fire insurance policy, contract of insurance, or application therefor, upon personal property, shall render void the policy or contract, or constitute a defense to a suit for loss thereon, unless such breach or violation contributed to bring about the destruction of the property.”

STATEMENT AND SUMMARY OF ARGUMENT.

The Petitioners' Brief does not correctly state the case. It is calculated to obscure and distort the facts at nearly every point where the circumstances underscore the problem of multiple sovereignty with respect to the validity and effect of maritime contracts such as that before the court, and the Federal solution of that exact problem by the Constitution in a "separate and distinct grant" (*The Belfast*, 7 Wall. 624, 640) with respect to "all matters of admiralty and maritime jurisdiction."¹

Petitioners' selective and incorrect statements serve, second, to suggest an atmosphere of the sectionalism that so long deferred the formation of the Federal Constitution with its admiralty clause. (Cf. P. Br. 11)

Third, the same aspects of Petitioners' presentation are designed to obscure the integral character of the contract of marine insurance and the general maritime law. It was the difficulties of multiple sovereignty, as sharply illustrated by the real facts here, that at some times and places had enforced some acquiescence even of completely independent sovereigns in a separate jurisdiction administering a sort of "*jus gentium*" to govern maritime affairs.² The significant fact is that the contract of marine insurance grew from that jurisdiction, that it "sprang from the

¹ "It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states,' etc."

Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 383.

² In *Croudson v. Leonard*, 4 Cranch (8 U.S.) 434 (1808), an action on a marine policy of hull insurance, it was pointed out that marine insurance came into England from a country that acknowledged the civil law" and that "this must have been the law of the policies."

law maritime and derives all its material rules and incidents therefrom." *Insurance Co. v. Dunham*, 78 U. S. 1, 31 (1870).

Fourth, the elisions of Petitioners' presentation enable them to put the whole question of the correctness of the judgment of dismissal in a false light, making it appear for a moment that but for the admiralty or maritime law they could have recovered under the statutes of Texas. Toward the end of Petitioners' Brief, however, it appears that they cannot even try to excuse one of their breaches (selling the vessel) by any Texas statute or doctrine. They argue that the concurrent courts below were wrong in finding as a fact (R. 19) that it constituted a breach of the contract to sell their interest in the vessel. (Br. 11-12) As we understand, that argument is not open to them here³ and the judgment of dismissal was necessary in any event. "One breach is sufficient." (R 203)

Petitioners' Brief never discloses, however, that among other things this contract was made, issued and delivered in the State of Illinois (by an insurer not shown ever to have done any business in Texas or even to have solicited any there);⁴ that the vessel cruised the navigable waters

³ Besides the two court rule Petitioners presented no such question on their petition, as they admit. (Petitioners' Br. 30)

⁴ Even the purported copy of a document of authority to do business in Texas attached to Petitioners' Brief at page 33 as "Appendix A" is not based on anything in the record. Except for the advices of the Clerk that it would be disregarded if not in the record a separately printed motion to strike such "Appendix A" would have been presented. We do move that it be stricken—together with the argumentative references thereto occurring throughout Petitioners' Brief (*Schley v. Pullman Car Company*, 120 U. S. 575, 578). The same motion is made with respect to "Appendix B" at page 34 of Petitioners' Brief on like grounds. (fn. 4 cont'd p. 11.)

of the United States under the coverage of this policy against navigating perils in five states as the map of the permitted waters shows (R. 169); that her regular berth in those waters was in Okiahoma (R. 7181) where she was destroyed (R. 62, 63); that her presence in the State of Texas on those waters was occasional and transitory (R. 82); that the State of Illinois, where this Respondent was sought out and solicited to enter into this contract and where this policy was issued and even delivered⁵ by express statutory provision has left the effect of warranties in policies of marine insurance to be governed by the maritime law.⁶

⁴ (cont'd)

We point out that on the actual record the first and second "Questions Presented for Review" by Petitioners' Brief as there stated (p. 5) do not arise.

⁵ *Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25, 57 S. W. 635, 639 and auth. cit.; *Wenz v. Business, etc., Ass'n*, 212 Ill. App. 581, 583-584; *Jackson v. New York Life Ins. Co.*, 7 F. (2d) 31, 32 (CA 9, 1925).

⁶ Illinois *Insurance Code* of 1937, § 154; Illinois Revised Statutes (1949 ed.) § 766:

"No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor, of which a copy is attached to or endorsed on the policy, and made a part thereof. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. *This section shall not apply to policies of marine or transportation insurance.*" (Our emphasis)

For the common law of Illinois see *Norwaysz v. Thuringia Insurance Company*, 204 Ill. 334; 68 N. E. 551 (1903).

If parties were now to be forced to consider competing claims of state laws to govern a maritime contract, the claim made by the legislature of the equal and sovereign State of Oklahoma to treat all insurance on property in that state as having been made in that state, would have to be considered. (36 *Oklahoma Statutes Annotated*, § 2.) The fact is, as Petitioners' Brief does not disclose, that the application of the Texas statute concerning mortgaging insured property is similarly addressed to property "in" that state. If state laws were the governing laws for marine contracts, the question would thus be: which state was this property "in"? It was, of course, a navigating vessel on the navigable waters of the United States and from time to time it was "in" both. Each state is final, however, as to the meaning of its own laws. Neither could exclude the claim of the other. The result in many instances could depend—under Petitioners' views of state powers to govern maritime contracts—on whether the plaintiff filed his suit in one state's court house or another's. Oklahoma would appear to have the stronger claim to govern the insured property on the basis that it was "in" that state. The regular berth of the insured vessel was in Oklahoma (R. 71) where a dock was built for her (R. 75, 81); the violation of the stipulation against sale of the vessel was by sale to an Oklahoma corporation (53, 54, 77, 78, 79); and her destruction on which an insurance loss is now asserted, occurred in that State (R. 52) while owned by a corporation of that State (R. 24, 25).

Parties seeking to enter into such a maritime contract under state laws would be faced with problems (of a sort on which judges have differed) as to whether the law of Illinois where the contract was made, or the law of Oklahoma, would govern all or some aspects of their relation.

Oklahoma has enacted: “§ 2. * * * All contracts of insurance on property, lives or interests in this State shall be deemed to be made therein.” (36 *Oklahoma Statutes Annotated*, §2.) And any like claim of Mississippi, where the vessel was when the Wilburns got this insurance, would have also to be weighed (to say nothing of Louisiana and Arkansas, where the vessel also navigated under this policy)—if state laws were now to govern maritime contracts of insurance on vessels moving on the navigable waters of the United States.

The necessity and obvious purpose of the admiralty clause written in the organic document making several independent states into one nation, has been declared and enforced by this Court in a long line of decisions, referred to below. If parties to maritime contracts were now required to balance the competing claims of states to subject maritime contracts to their laws, this case illustrates that they would have to enter upon an analysis of the laws of many states, including what all those laws might be at the time with respect to the many problems presented by such a contract, and what the rules of those states were, at the moment, in the frequently uncertain field of “conflicts of law.”

Indeed, if Petitioners’ contention is correct, and Texas has subjected, and can subject, to its law every insurance contract payable to any of its “inhabitants,” then any sovereign state would have the same power. The same assured from time to time can, and does, inhabit several states of the nation; frequently, as here, there are several assureds. Were one of several assured to be⁷ or to become

⁷ No residence address for Glen Wilburn was shown as of the time when the contract was made; possibly he inhabited Burns Run, Oklahoma, where the vessel was regularly berthed. (The fourth Petitioner is an Oklahoma corporation not domesticated in Texas.) (R. 24, 25)

an inhabitant of Oklahoma, while another or others inhabited Texas, and a third Mississippi (where the vessel was when the Wilburns contracted) the same maritime contract could then be ruled by three sets of law, one for each payee—if state statutes having the effect for which Petitioners contend can override the general maritime law in the government of maritime contracts. Corporations are often assured; they are easily domesticated in several states at the same time.

Reflection multiplies illustration; as litigation would have done but for the fact that parties to marine insurance contracts have been relieved of “the unnecessary burdens and disadvantages of discordant legislation” by a “separate and distinct grant” committing all “matters of admiralty and maritime jurisdiction” to a Federal sovereign for all the navigable waters of the United States.

In view of all the facts as finally crystallized in the record of a trial, and after considering the decisions of this Court, we argued to the courts below (R. 149-150, 205) that even the rudimentary concepts of fairness imposed by the due process requirements of the XIVth Amendment, limiting the power of states to give their laws extra-territorial effect, would in any event exclude Texas laws here. See: *Hartford Ins. Co. v. Delta Co.*, 292 U. S. 143, 149, 150 (1933); *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426, 434-435 (1926); *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 514, 517 (1926). Both courts held that Respondent's other constitutional right—its right under the admiralty clause that the validity and effect of this distinctively maritime contract should be governed by the general maritime law, not by state laws—was clear and controlling. Other questions were not passed on. (R. 205) Petitioners make no argument that this judgment was wrong under any law but Texas law.* Their sole argument here is that it

* It certainly was right under the law of Illinois where the policy was underwritten, issued and delivered (*Ill. Ins.* (Fn. 8 cont'd p. 15))

was wrong under Texas law. The XIVth Amendment, without more answers that. For under the XIVth Amendment Texas law, whatever it is, cannot apply. (Auth. cit.)

The judgment was dismissal. Every presumption of correctness attends the result.⁹ Petitioners must show a law, that could apply, under which the judgment was wrong, or the attack on the judgment fails as their argument recognizes.

The fact that the courts below found it unnecessary to pass on Respondent's right under the XIVth Amendment (or even if they had ruled against it) would not make it any less available here in support of the judgment. *Langnes v. Green*, 282 U. S. 531, 538-539 (1930).

Marine insurance is characteristically desired in a hurry, on a transitory subject matter, far from the place where it is underwritten (as the brief for the learned *amicus curiae* also makes plain). Petitioners do not disclose that this was the situation here.¹⁰ In the nature of marine

(Fn. 8 cont'd)

Code of 1937, § 154, codified in *Ill. Rev. St.* (1949 ed.) § 766, *supra*; *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334; 68 N. E. 551 (1903) *supra*. It was equally right under the law of Oklahoma. See *Deming Investment Co. v. Shawnee Fire Ins. Co.*, 16 Okla. 1; 83 Pac. 918 (1905). Oklahoma has no legislation affecting these contract terms.

⁹*Bagnell v. Broderick*, 38 U.S. 436, 446 (1839); *Townsend v. Jemison*, 48 U.S. 706, 724 (1849)

¹⁰ Petitioners' omissions and incorrect statements have forced us to print as an appendix a substantial portion of the depositions showing the method of underwriting, where the contract was made, and the relations of the parties, the depositions introduced by them at the trial as their Exhibit 4 (R. 95). For rulings of the court excluding portions thereof, see R. 113, 115, 116, 120 and 122. The original of these depositions is on file in this Court pursuant to stipulation filed herein. Appendix references are indicated: "Dep. ...a."

insurance situations (including this one) their necessities cannot be met without crippling delay and expense unless the assured's representations are accepted as the basis of the underwriting (cf. Brief for the *Amicus Curiae*, pages 10, *et seq.*). That is the way marine hull insurance is underwritten. (Dep. 8a)

The maritime law, which reflects this practice alone makes it possible, by its characteristic rules, one of the most fundamental of which is that express terms of warranties to be performed by the assured are literally enforced. (Cf. R. 202 and brief for the learned *amicus curiae*.)

The Wilburns bought this yacht in Mississippi (R. 59) on June 4, 1948, and wanted insurance on her against navigating perils. (Dep. 17a) They turned over the matter of getting insurance for them to a Mr. McKinney who was in the insurance business as "R. L. McKinney Agency" at Denison, Texas (R. 89). He handled ninety per cent of the Wilburns' insurance matters. (R. 89) They asked him to get the insurance for them. (R. 70) Admittedly, his status in this matter was that of their agent representative. (R. 80; Dep. 3a, Dep. 16a)

McKinney himself had no facilities for placing vessel insurance. (Dep. 3a)

McKinney telephoned (Dep. 3a) and later wired (Dep. 16a) to H. H. Cleaveland Agency, an insurance agency (Dep. 2a) in Rock Island, Illinois. (Dep. 2a) In this telephone conversation and correspondence¹¹ he gave the description of the risk (Dep. 3a) and asked this Illinois agency, Cleaveland, to contact its insurance carrier for insurance (Dep. 3a) on this yacht. (R. 171 and see R. 85).

¹¹ His contacts with Cleaveland were through Cleaveland's people, White and Rossow, whose depositions are appended.

Cleaveland had no general authority to act for this Respondent on risks so far away, as Petitioners' Brief admits. (Petitioners' Brief 7)

Accordingly, in June, 1948, the broker, Cleaveland, approached this Respondent at its Western Marine Office in Chicago, Illinois, by telephone, mail and personal visit, submitting the oral application on the information supplied to it by McKinney.¹²

The request was for insurance against navigating perils subject to standard *yacht* conditions (Dep. 17a) and Cleaveland's man who made the request testified that was what he got. (Dep. 17a)

As Petitioners' Brief states, the policy had been originally issued to Marshall and Shuler from whom the Wilburns bought the vessel, and was then subject to a "port insurance" endorsement warranting her confined to the harbor of Greenville, Mississippi.¹³

The endorsement solicited by Cleaveland reinstated all terms under the heading "Conditions" (R. 173) including the warranty conditions which Petitioners violated, cover-

¹² The written "application and survey" whose false statements Petitioners apparently seek to excuse on the ground that it was later prepared by their insurance man McKinney (Petitioners' Brief 7) was not asked for until long afterwards. (Dep. 46a) Petitioners say (Petitioners' Brief 7) it was forwarded (by Cleaveland) to Respondent in February, 1949, a date months after any insurance transaction and only shortly prior to the burning of the vessel which occurred on February 25, 1949.)

¹³ Port insurance: See R. 243-244, and *Robinson v. Home Ins. Co.*, 73 F (ad) 3 (CCA5, 1934); cert den 294 U.S. 712.

age against "perils of the seas" (R. 173, cf. Arnould, *Marine Insurance*, 13th ed. 812), negligence of "masters, mariners, engineers or pilots" (R. 174; cf. *Read v. Agricultural Ins. Co.*, 263 N.W. (Wis. 632, 634), and against liability for collision "with any ship or vessel" (R. 174; cf. Arnould, *Marine Insurance*, 13th ed. 792).

The new endorsement was mailed by Respondent to Cleaveland (R. 165) which signed it (R. 165) and forwarded the endorsement and the policy to which it appertained to McKinney. (Dep. 20a)

When McKinney later (long after he and his clients were in possession of the policy carrying these terms) wrote to Cleaveland, the broker, stating that assured had an investment of \$40,000 in the vessel and suggesting to Cleaveland the possibility of securing an increase to that amount (Dep. 4a) the same course was followed. (Dep. 5a) The Illinois underwriter, approached again by Cleaveland at McKinney's request, agreed to "bind" the increased amount before any endorsement increasing it was prepared. (Dep. 42a) This endorsement when prepared in Chicago was sent to Cleaveland in Rock Island (Dep. 50a) for Cleaveland's signature, and then mailed to McKinney.

The transaction at every step followed that course: request by assured's agent McKinney to Cleaveland in Rock Island, Illinois; approach by Cleaveland's man to respondent in Chicago; binder, issuance, signature, and mailing-in Illinois. (Dep. *passim*.)

The real facts are in contrast with statements of Petitioners' Brief that the policy was "issued and delivered" at Denison, Texas. (Petitioners' Br. 6) It was "issued" in Illinois (*vide supra*) and the mailing in Illinois was its "delivery" in every sense material to the question of

where the contract was made and completed. (*Fidelity Mutual Life Ass'n v. Harris*, 94 Tex. 57 S.W. 635; *Jackson v. New York Life Ins. Co.*, 7 F (2d) 31, 32 (CA 9, 1925); *Wenz v. Business Men's Accident Ass'n.*, 212 Ill. app. 581, 583-4¹⁴)

The real facts are similarly in contrast with Petitioners' statement that the policy "was purchased from R. L. McKinney Agency." (Petitioners' Brief 6-7) McKinney, who had "no facilities" for placing vessel insurance (*vide supra*) was the man whom the Wilburns "sort of elected" to get this insurance for them. (R. 80) The Wilburns gave him ninety per cent of their insurance business (R. 89) and he took over this job for them, applying to the marine insurance market in Chicago through an Illinois broker for the purpose. (*Vide supra*.) The policy and its endorsements was not signed by him but by the Rock Island brokerage house in Illinois, thereunto specially authorized in every instance. The statement of Petitioners' Brief that the premiums were "delivered" to McKinney (Petitioners' Brief 7) is ambiguous. The premiums were not paid to him, but were paid by checks to the order of H. H. Cleveland Agency, Rock Island, Illinois (R. 89a and 195a) which he forwarded. McKinney's status was admitted at the trial to be that of the chosen representative of the Wilburns (*vide supra*) to "secure" this policy for them, which he did through an Illinois agency.¹⁵

¹⁴ We suppose this would be evident to Petitioners if a loss had occurred while the policy was in the mails.

¹⁵ Considerably after these contacts were established McKinney wrote Cleveland that he had "recently" made arrangements to represent Respondent, a statement which the trial court struck out on familiar principles. (R. 115) No complaint was made of the correctness of the ruling at the trial or afterward; Petitioners never called their man (Fn. 15 cont'd p. 20)

Petitioners' irrelevant insistence that they were in the grocery business (the vessel was owned by an Oklahoma corporation in the commercial boat business when she was burned) takes on a peculiar cast when in fact Petitioners were represented by their chosen man in the insurance business. (*Vide supra*) They neglect to state that they even went over this yacht policy with their own insurance man. (Dep. 57a).

There are other errors in Petitioners' presentation. Among them, Petitioners say they are "citizens of Texas." Petitioners are Wilburn Boat Company, an Oklahoma corporation, with which Respondent never contracted, and three individuals. At the time when only two of the individuals were assureds, the policy said they were "d/b/a Wilburn Brothers, Denison, Texas." (R. 168) This was amended, effective August 6, 1948, when the third individual was added, eliminating even any business address. (R. 165).

Petitioners omit the facts as to the voyaging of this vessel in five states, her regular berth in Oklahoma, and the transitory nature of any presence in Texas, but state, incorrectly, that her "registered" hailing port (Petitioners' Br. 6) was Denison, Texas. Hailing ports are not "registered," but painted on the stern; there is no evidence that anything was painted on the stern of the Wanderer.¹⁶

(Fn. 15 cont'd)

McKinney to testify. The record is clear that McKinney was assured's agent in the evidence of J. F. Wilburn (R. 70, 80) and the course of the negotiations as shown by the depositions offered by Petitioner (See especially Dep. 3a, Dep. 16a.)

¹⁶ "A vessel of the United States must have a 'hailing be the same but if they are not it is the 'hailing port' de- port' as well as an approved home port. These ports may fined by this statute [46 U.S.C.A. 47] that must be shown on the stern as required by R. S. § 4718 as amended (Section (Fn. 16 cont'd p. 21)

Reference to R. 168 is made by Petitioners to support their statement (Petitioners' Br. 6) that the vessel was "documented" at Houston (far from the waters permitted by this policy.) (R. 169). That reference is on a recorder's note on a bill of sale conveying the vessel to an Oklahoma corporation. (R. 48) Further it appears that both when the Wilburns purchased the vessel, as also when she was sold to the Oklahoma corporation, her "document," viz., her "*Latest Consolidated Certificate of Enrollment and License*" (R. 44, 48) was one that had been issued "at the port of Chicago, Illinois." (R. 46, 50)

Petitioners state that the policy was "made payable" at Denison, Texas, referring to Record 168. (Petitioners' Br. 7) The reference is to the business address shown when two of the Wilburns were the assureds. (As stated, even this was eliminated by amendment.) (R. 165) No place of payment was ever specified in the policy.

However, the policy does name three offices of the Respondent—San Francisco, Chicago and New York—(R. 171, 180) and calls for notice of loss at "the nearest office of this Company or to the Agent who shall have issued this Policy." (R. 176) The latter was Cleaveland, of Rock Island, Illinois. (R. 172) (Cf. *Hartford Ins. Co. v. Delta Co.*, 292 U. S. 143, 149, 150 (1933).)

(Fn. 16 cont'd)

238 of this volume)." *Arzt, Navigation and Safety*, 326-327. The hailing port may be any one of several places, including a "port" (Denison is *not* a port) where "one or more" of the owners reside. 46 U.S.C.A. 47. There is no evidence as to where L. G. Wilburn resided when the three Wilburns purchased the vessel. For some time before the vessel was lost she was owned by "Wilburn Boat Company, a corporation not domiciliated in Texas, whose office and principal place of business was Durant, Bryan County, Oklahoma." (R. 48)

Petitioners' incorrect assertions as to the admitted status of their own agent, McKinney, have been partially commented upon. Further misleading statements concerning McKinney occurring in Petitioners' Brief are that he "examined, inspected and evaluated the risk," made a survey of the boat "for respondent," and "reported to respondent concerning the risk." (Petitioners' Br. 7) These are not correct statements. The inference from them might be that he was Respondent's designated representative to act for it in these particulars. As appears above, this is the exact reverse of the truth. Incidentally, McKinney never had any contact with Respondent, but only with Cleaveland (Cf. Depositions). McKinney's acts were those of the Wilburns, including the representations which he made to Cleaveland, for Cleaveland to convey to Respondent in order to get the insurance. (See *Eagle Star v. Tadlock*, 22 F. Supp. 545 (S.D. Cal. 1938) on 548, collecting authorities.)

Petitioners avoid any flat statement that McKinney was Respondent's agent. But they omit the explicit record and admitted fact that his status in this matter was that of the Wilburns' agent (*vide supra*) and indulge the inaccuracies referred to. Neither Respondent's underwriter in Chicago, nor any one else "for" it, examined or inspected or surveyed the risk. The underwriting was immediately effected on the representations of assureds' agent McKinney, transmitted to the underwriter by Cleaveland, all in reliance on the representations that came from assureds through assureds' representative, McKinney, and transmitted to Respondent by Cleaveland. (*Vide supra*.) Afterwards, when the underwriter asked assureds to furnish an application and survey it was to enable the underwriter to judge value (Dep. 46a); the request was

that *assureds* have some "competent marine surveyor" make a survey. (Dep. 46a) None was furnished until shortly before the vessel was burned (*Vide supra.*); the signature on it is that of Petitioner J. F. Wilburn and the only other person claimed to have had anything to do with it was McKinney (P. Br. 7).

Marine insurance contracts are *uberrimae fidei* and unless the underwriter is put in possession of all the facts material to the risk or premium they are void. *Stecker v. American Home Fire Assur. Co.*, 299 N. Y., 1, 6. Indeed, this policy explicitly declared that it was void in event of "any misrepresentation or concealment, whether before or after loss." (R. 176)¹⁷

¹⁷ Marine underwriting in order to meet the needs of maritime transactions, is characteristically done on subject matter at a distance, in favor of parties at a distance, and wanted in a hurry, all illustrated here. Obviously it could not be so conducted if distant representatives of the assured who furnish false, inaccurate and incomplete information, were to be translated into agents of the underwriter capable of binding or estopping him by their own knowledge that their own representations were false, inaccurate, or incomplete. (In this connection see the Brief of the learned *amicus curiae* and *Roseman v. Ins. Co.*, 301 U. S. 196, 206; *Hartford Fire Ins. Co. v. Walker*, 94 Tex. 473; 61 S. W. 711; *Retailers Fire Ins. Co. v. Jackson Gin Co.*, 10 S. W. (2d) 799 (Tex. Civ. App.), *U.S. Fidelity & Guaranty Co., v. Taylor*, 273 S. W. 320 (Tex. Civ. App.).) At Brief 7

Petitioners say McKinney "thought he had told respondent that the property was conveyed to a corporation," referring to Rossow's exhibit No. 41. The reference is to a letter McKinney wrote to Cleaveland after the loss, which the lower court struck out. (R. 116) Over and above the impropriety of referring to unsworn statements of Petitioners' agent after the loss which the trial court eliminated except for other purposes (without complaint then or later as to the ruling), it is difficult to account for Petitioners' (Fn. 17 cont'd p. 24)

At page 7, Petitioners' Brief states that the Wilburns "changed their partnership into a corporation" and that each of the named assureds "retained their same interest in the boat in that they each owned one-third of the stock of the corporation. (See Appendix B.)" Appendix B so referred to as the basis of this argumentative statement is no part of the record, as above pointed out. As here appears it is the basis of the only argument made by Petitioners (Petitioners' Br. 29, *et seq.*) to attack the findings below that the sale of the vessel violated the policy, *viz.*, that when they sold their owners' interest in the vessel to a corporation the assured interest was not "changed," which is patently incorrect.¹⁸ The argument proceeds, moreover, on a revision of the policy which plainly says that the assured interest shall not be "sold." (R. 176) It is stipulated that it *was* sold. (R. 25) As pointed out, this stipulated breach is not defended by Petitioners on any Texas statute but on "common law" grounds. Elsewhere they insist that there is no difference between admiralty and common law as to the rule that warranties must be literally complied with in an insurance contract. (Petitioners' Br. 11)¹⁹ The question they seek to raise

(Fn. 17 cont'd)

remark on any consistent theory. Both courts below held the sale to the corporation a fatal breach. (R. 203, 19-20)

¹⁸*White v. Evans*, 117 N. J. Eq. 1, 174A, 731, 732, (1934); *Bowling v. Continental Ins. Co.*, 186 W. A. 164, 103 S.E. 285, 287 (1920).

¹⁹ Apparently Petitioners feel that no rule that characterizes the maritime law is part thereof, if it also characterizes the common law of some or one of the states.

They state that the District Court cited *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, which, as they there point out, is a common law case, "to establish the rule that admiralty law governs" going on to say that the Texas legislature "enacted a statute requiring the (Fn. 19, cont'd p. 25)

as to whether this stipulated breach, found by the concurrent courts below, was a breach or not, is not presented by the Petition as above pointed out.

At page 8 Petitioners say that after a corporation was formed "the respondent by written endorsement changed the named assureds to read as follows: 'Glen, Frank and Henry Wilburn d/b/a Wilburn Boat Company.' This endorsement was effective August 6, 1948." If the intent of this statement is to suggest that this endorsement was an ineffective attempt by Respondent to make the policy run to a corporation, one answer would be that there is no such evidence; but a conclusive answer here would seem to be that the concurrent courts below both found the sale to the corporation to be a breach of the policy requirement that the insured interest should not be sold, and no question is presented as to correctness of the finding.²⁰

Similar considerations and others deprive Petitioners' suggestion (Petitioners' Br. 9), that the maritime law does not "recognize" a common law mortgage, of the (unspecified) significance they attribute to it. Aside from the

(Fn. 19 cont'd)

insurance company to prove that the breach of warranty contributed to the loss" in order to do away with the doctrine announced by that common law case. (Petitioners' Br. 11) It is highly unreasonable to suggest that the District Court cited a common law case to show "that admiralty law governs." Petitioners are aware that the Texas statute to which they refer as changing the common law there does not excuse their breach in selling the vessel. (See: *Citizens State Bank v. American Fire & Casualty Co.* 198 F(d) 57 (CA5, 1952) And they do not seek to excuse that breach by any statute or doctrine of Texas. (Petitioners' Br. 11-12) "One breach is sufficient." (R. 203)

²⁰ The corporation did not own the vessel at the date of the endorsement of August 6, 1948, to which Petitioners refer.

fact that they stipulated at the trial that the vessel *was* pledged without Respondent's consent (R. 23-24) both courts below found that these repeated and stipulated pledges were a violation of the policy (R. 281, 19) and no question is presented as to the correctness of the finding. Petitioners' irrelevant assertion that admiralty does not recognize a common law mortgage is also inaccurate. Admiralty does in some circumstances recognize and enforce a common law mortgage on a vessel as between the parties thereto. *The Lottawanna*, 21 Wall. (88 U.S.) 558, 582.

Petitioners are in grave error in characterizing this as a policy of "inland marine insurance," as sufficiently indicated in the Brief of the learned *amicus curiae* (at page 4 and 11).

ARGUMENT.

I.

This Contract of Marine Insurance on the Hull of a Navigating Vessel Is a Maritime Contract, that Sprang From, and Is Governed by, the General Maritime Law Which Rules the Admiralty and Maritime Jurisdiction.

A general maritime law is very old. (Cf. Brief for *Amicus Curiae*.) Even in its primitive forms it alleviated somewhat the inconveniences of conflicting sovereignties, but had the difficulties attendant on maintaining any international law, and especially so, for a time, in England.

When the states ceased to be independent sovereigns the Constitution effecting their union did not leave maritime affairs in this country to the commerce clause. It made maritime affairs the subject of a separate and distinct grant as to "all matters of admiralty and maritime jurisdiction." This was not a duplication, but a unique solution of a unique aspect of the problems of union. *The Belfast*, 7 Wall. (74 U. S.) 624 (1868).

Whether a contract of marine insurance was a maritime contract and thus within the meaning of that grant was soon settled. The motive and policy of the Constitution to make independent states into one nation was, and is, too obvious to be overlooked in understanding a special grant of power to one national government in maritime affairs. And that prevailed—against English precedents then current as to the meaning of "admiralty" that had been mutilated by insistence of Whig Parliaments and Sir Edward Coke that the common law peculiar to England was the only "law" having any force in England.

The foregoing, occurring in more detail in the decisions of the judges of this and other Federal Courts, is developed in the decision of Mr. Justice Story in 1815, holding a contract of marine insurance to be a maritime contract. He concluded:

“At all events, there is no solid reason for construing the terms of the constitution in a narrow and limited sense, or for ingrafting upon them the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle. The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries, or, in other words, to embrace all those causes, which originally and inherently belonged to the admiralty, before any statutable restriction.”

De Lovio v. Boit, 2 Gall. 398; F. C. No. 3,776 at 443

When the subject arose in this Court in 1870, this decision was approved in strong terms, as were other like decisions of the Federal Courts. *Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1 (1870).²¹ The decision that a contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction of the United States was reiterated. The source, and substance, of the law of the marine contract of insurance was declared by this Court:

²¹ *Peel v. Merchants Ins. Co.*, F. Cas. No. 10,905 (1822); *Hale v. Washington Ins. Co.*, F. Cas. No. 5916 (1842); *Gloucester Ins. Co. v. Younger*, F. Cas. No. 5487 (1855).

"Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime and derives all its material rules and incidents therefrom."

(*Ibid*, 11 Wall. 1, 31)

We are unable to find any case to the contrary in the course of our national history. The doctrine appears to be uniform, down to and including *Compania etc. v. Archdale*, N. Y. Law Journal, June 28, 1954, p. 5, not yet officially reported. (Cf. the indices of "American Maritime Cases" for marine insurance.) Benedict's standard treatise on *Admiralty* states that the contract of marine insurance "is, indeed, of all contracts, the most purely maritime." (Sec. 110a, 6th ed., 1940).

In holding the contract of marine insurance to be a maritime contract this Court repeated that the grant of power to the Federal sovereign as to matters of admiralty and maritime jurisdiction extends "to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide." (*Ibid*, 11 Wall. 1, 25.)

General maritime law has been the means of relieving maritime transactions of the inconveniences incident to conflicts of independent sovereignty as to all matters of admiralty and maritime jurisdiction. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

The separate and distinct provision of the Constitution was addressed to all matters of admiralty and maritime jurisdiction when the states ceased to be independent sovereigns, and the whole people created one national sovereign. Thenceforth one body of substantive law was the law of the nation as to the matters within its admiralty and mari-

time jurisdiction. This is the general maritime law as fashioned under Article III by the courts of the nation and thus, ultimately, this Court or as declared by Congress. *Pope & Talbot v. Hawk*, 346 U. S. 406, 409-411.

No question is made here as to what the general maritime law is as to any matter in controversy. (R. 280, 281 and auth. cit.) The question made here is whether the general maritime law of which this uniquely maritime contract is "part" and from which it derives "all its material rules and incidents," governs the validity and meaning of its terms. The only alternative suggested by Petitioners is that the validity and meaning of its terms shall be ruled by the laws of the several states, as before the Constitution.

The learned *amicus curiae* and the authorities mention the unusual degree of reliance placed on the assured in marine insurance transactions.²² Insurance in substantial sums in favor of strangers, on a transitory and distant subject matter, is characteristic of the field of marine insurance. The maritime law strictly applies a rule that warranties written in the policy to be performed by the assured, will be literally enforced. (R. 280, 281).

This vessel was in Mississippi about to start on a voyage of hundreds of miles; the assureds' agent McKinney had a place of business in Texas; H. H. Cleaveland Agency to whom he telephoned and wired was in Rock Island, Illinois, and the respondent insurer, to whom Cleaveland applied, was in Chicago.

On the day that Cleaveland's man, Rossow, saw Respondent at its office in Chicago (Dep. 17a) following a telephone call and a letter (Dep. 3a), he was able to wire

²² Cf. Brief of *Amicus Curiae*, pages 9 *et seq.*

McKinney that Respondent was binding the coverage to "full marine perils" (Dep. 17a).

Again, when the possibility of an endorsement increasing the amount of insurance by \$30,000 (from \$10,000 to \$40,000) was suggested in a letter to Cleaveland by McKinney, representing therein that assureds had an investment of \$40,000 in the vessel (Dep. 40a), Cleaveland's man Rossow secured authorization of a binder for that sum in a telephone conversation with Respondent on December 20, 1948 (Dep. 42a) by reading to Respondent McKinney's foregoing representation that assureds had a \$40,000 investment in the vessel; and, thus securing Respondent's consent, was able on the day of that conversation to wire McKinney: "Binding this amount" (Dep. 41a)—for which advices McKinney expressed his thanks and asked for an endorsement increasing the coverage of \$10,000 by \$30,000. (Dep. 44a).

This binder was confirmed to Cleaveland in writing on December 28th, with the suggestion to Cleaveland "that you request the assured (*sic*) to have a competent marine surveyor inspect the vessel, and send us a copy of the report together with the surveyor's estimate of its present day value," etc. (Dep. 46a) On January 18th, 1949, the signed endorsement was mailed by Respondent to Cleaveland increasing the amount of insurance to \$40,000 and asking again for a survey or application, referring to the previous request. (Dep. 50a) This endorsement, dated back to December 20 when Respondent agreed to it, as above, was signed by Cleaveland (R. 167, 168) and forwarded to McKinney, the same letter transmitting Respondent's request that assured "have a competent marine surveyor inspect the vessel and complete the attached application," etc. (Dep. 51a)

Thus this increase in the amount of insurance was effected, bound, confirmed, and embodied in endorsement retroactively effective, on the faith of the statement of a stranger representing assureds, as to the amount invested in a vessel then nearly a thousand miles away—while the underwriter waited for a copy of a survey desired in order to have assured get the estimate of a competent surveyor as to whether the \$40,000 investment had resulted in corresponding value.²³

²³ Petitioners say that afterwards on February 9, 1949, the "application and survey" which they print in the record was sent to Respondent. (Petitioners' Brief 7) That document repeats the statement (no longer claimed to be true—Petitioners explained it in their Brief to the Court of Appeals as a "mistake") of a total of \$40,000 cost (R. 190) and makes other false statements, e. g.: "Particulars of any mortgage or other encumbrance None." (The vessel was in fact then pledged by successive chattel mortgages for a total indebtedness of \$28,000, none of which was paid.) (R. 24) Again: "Owner, Wilburn Brothers. Address: Denison Texas." (The vessel was in fact then owned by Wilburn Boat Company, an Oklahoma corporation, not domesticated in Texas (R. 24, 25) whose office and principal place of business was Durant, Oklahoma.) (R. 48)

If this "application and survey" of February 9, 1949 came to the underwriters' attention before the burning of the vessel, which occurred on February 25, 1949, it involved no waiver of the policy terms (R. 203) and no such question is presented. (Cf. Petition for Certiorari.) The statement in this belated survey which Petitioners describe as a disclosure that the vessel was "to be" used commercially (Petitioners' Brief 7) was not a disclosure of the fact that the Wilburns had been using her for commercial purposes ever since they bought her and that the policy was void for that breach (R. 203) as well as for other breaches, as to which the "application and survey" made statements, as above, contrary to the facts as stipulated at the trial.

Fundamental to such situations is the fact that marine insurance on the hulls of navigating vessels, both as to the transaction and the subject matter to which it is addressed, typically involves a section of the map transcending the political boundaries of any single state. In an earlier case where this Texas "causation" statute (as Petitioners term it) was also argued to require the underwriter there to show, not only that the undertaking had been violated by the assured, but also that it caused the disaster, it was held:

"The policy covered the vessel on navigable waters of the United States without as well as within the state of Texas. It was a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas."

Aetna Ins. Co. v. Houston Oil & Transport Co.,
49 F. (2d) 121, 124 (CA 5, 1931).

This Court denied certiorari in that case—284 U. S. 628.

Marine underwriters can rarely be in a position to show why vessels that navigate waters a thousand miles away founder, or are burned by fire in the small hours of the morning after being acquired for a commercial venture (that had, to say the least, not yet succeeded), that had been loaded with unpaid mortgages, and sold—all in violation of the warranties. But by the rule of the maritime law, the law "from which their contract springs" and "by which it is governed", they are entitled to strict enforcement of the terms of those warranties, and need show only that they were broken. (R. 202, 203) This rule is adapted to the nature and necessities of the maritime situations out of which it grew, and of which it is characteristic. (*Vide Supra*).

It is difficult to see how marine insurance could serve the necessities of honest vessel operation as it has long done in its great field under any other law than that from which it sprang.²⁴

When Congress adopted a model marine insurance law for the District of Columbia, it is significant that it did not change any of these rules of the maritime law.²⁵

Granted that as Petitioners say (Brief 25) there cannot be uniform "terms" of marine insurance policies such as various states have sought to legislate as to other forms of insurance, there can be, and there is, uniform maritime law as to the force, interpretation and validity of the warranties parties employ in policies of marine insurance. It is significant that Congress investigated marine insurance for three years and found no occasion to change the uniform general maritime law in its model marine insurance bill.

Granted, further, that as the powers of Congress were once understood under the *commerce* clause (cf. the doctrine of *Paul v. Virginia*, 8 Wall. (75 U. S.) 168, and *Hooper v. California*, 155 U. S. 648—the doctrine that was relied on by the Congressional witness Petitioners quote at page 24 of their Brief as they admit at Brief 25) Congress could not then do for the whole nation what its Model Marine Insurance Act did, viz., regulate the "business" of marine insurance.²⁶ The views of the witnesses that Petitioners

²⁴ Petitioners apparently contemplate that premiums will be increased. (Brief. p. 11)

²⁵ Nor was any change therein desired by the ship-owner witnesses or anyone else. Cf. references of Petitioners' Brief at page 25.

²⁶ This Act permitted marine insurers to write also other kinds of insurance contracts (apparently for that purpose including the artificial definition to which Petitioners at Brief 19 refer), provided for taxation on net premiums, etc. etc. 35 D. of Col. Code. §§ 1101-1133.

quote express no doubt that if Congress desired to make a change only in the maritime law, viz., the rules governing the force and interpretation of the maritime contract, it could have done so at any time and for the whole nation, provided only Congress did not seek to reintroduce the diversity of state control as to the rules of the maritime law that the admiralty clause was designed to end. *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 385-389 and auth. cit. (1924).

It will be apparent that the admiralty and maritime jurisdiction with respect to marine insurance is the substantive law of the maritime contract itself, the contract which "sprang from the law maritime and derives all its material rules and incidents therefrom,"—which is "part" of that maritime law "by which it is governed," as this Court has said. (*Insurance Company v. Dunham*, 11 Wall. (78 U. S.) 1, 30-35 (1870) *supra*.) The general maritime law does not govern (R. 205) what taxes marine insurers shall pay; nor whether they shall be individuals or corporations; nor the amount of their reserves; nor whether they shall also write other kinds of insurance; and whether such contracts, whose own substantive force and validity springs from and is governed by the maritime law, shall also be made available on humanitarian grounds to seamen on vessels that never leave the state where the contract was made, is another question not presented here.²⁷

But the construction and the validity of the terms that the parties employ in the maritime contract itself is a part of the general maritime law itself, from which law the contract sprang, from which it derives all its material rules, and by which it is governed.

²⁷ Cf. *Maryland Casualty Co. v. Cushing*, 347 U. S. 409; 98 L. Ed. 519; and see Record 205.)

Petitioners' argument to the first of the two points made in their brief begins with the proposition that: "Insurance Is Not Commerce." (Petitioners' Brief 13.) That indicates a confusion that becomes the substance of Petitioners' ensuing argument (as also pointed out in the brief of the learned *amicus curiae*, Point II, p. 19 *et seq.*)

Article I, Section 8 of the Constitution is separate and distinct from Article III, Section 2. Whether "Insurance is not commerce" under Article I, Section 8, the unique contract of marine insurance is a maritime contract under Article III, a contract that in all its material rules and incidents is derived from and governed by the general maritime law.

What Petitioners wish to suggest, as presently appears in their Brief, is that because all insurance was personal and local and thus beyond the Federal power under the commerce clause, as that clause was construed in *Paul v. Virginia*, 8 Wall. 168, it would be "inconsistent" to say that marine insurance is not similarly personal and local and thus beyond Federal power under the admiralty clause.

The primary answer to Petitioners' suggestion is not that *Paul v. Virginia* was recently held to have been mistaken (although that also is true) but that it was mistaken with respect to an entirely separate and distinct constitutional provision.

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connec-

tion with one another, and are conferred by the Constitution by separate and distinct grants. *The Genesee Chief*, 12 How. 452."

The Belfast, 7 Wall. 624, 640

See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160, 161, 163-164.

This contract of marine insurance is integral to the admiralty and maritime jurisdiction of the United States, deriving all its material rules and incidents from the general admiralty law "by which it is governed." That is an entirely different test and principle from any that can be stated under the commerce clause.

And it is on that test, and that principle, arising under the admiralty clause (and not existing under the commerce clause) that the laws of the several states are excluded from matters of "admiralty and maritime jurisdiction."

In *Watts v. Camors*, 115 U.S. 353, there was (p. 353) a "charter-party, made and concluded upon in * * * New Orleans," which provided for payment of the estimated freight if the charterer broke the contract. The maritime law and the law of Louisiana were directly in conflict as to that clause, Louisiana enforcing it strictly. This Court upheld the charterer's contention that (p. 359) "being a maritime contract, its construction was not affected by the local law of Louisiana."

This case among others was cited by this Court in *Union Fish Co. v. Erickson*, 248 U. S. 308, in holding that a maritime contract which was declared void by Section 1624 of

the California Civil Code, i. e., the *lex loci contractus*, would be enforced because it was a valid contract (p. 313) under the general maritime law.²⁸

In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, suit was on an ocean bill of lading issued in New York. It was held that state law was not controlling, and that the maritime law as adopted in this country governed the contract.

Petitioners' next position (Brief 14) in support of their first point is to put forward the "police power" of the states against the general maritime law. Their argument correctly recognizes that police power is the power to govern. Accordingly, the next step in their argument is: "Since a national bill regulating marine insurance would be unconstitutional this would be equivalent to granting to marine insurance companies a blanket license to operate without legal restraint." (Brief, 15) Petitioners seem to

²⁸ At page 16, note 13, Petitioners state that "the State of California attempted to legislate in a field already taken over by Federal legislation. To-wit: laws relating to seamen contracts," etc. The contract in question was for the services of a master; no seamen's legislation was mentioned in the opinion or the briefs of counsel. The ground of decision was stated as follows:

"If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed."

Union Fish Co. v. Erickson, 248 U. S. 308, 314.

The "field has been occupied" under the Constitution itself, by the general maritime law. See *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 161.

overlook the decisions of this Court holding that Congress can legislate under the admiralty clause to change the general maritime law of the nation—authorities which recognize, also, Congress cannot revive the diversity of state control. *Panama R.R. Co. v. Johnson*, 264 U. S. 375, 385-389 and *cas. cit.*

Petitioners again overlook that when Congress did pass a Model Marine Insurance Act, it found no occasion to change the ordinary rules of the maritime law respecting the meaning and force of warranty terms in a policy of marine insurance as established by the general maritime law, but only to regulate the "business." (*Vide supra*)

Petitioners then assert (Brief 15) that codification is essential because of the complexity of the marine insurance "business," and that "available defenses" must by necessity be handled by the legislative branch of the "State" governments, etc. We presume that by "defenses" they mean those arising by the terms and construction of the marine insurance contract which derives all its essential rules and incidents from the general maritime law. They do not explain why the States alone are competent to change the general maritime law. Congress can change the general maritime law, subject to the qualification imposed by the very purpose of the grant that it shall not revive the diversity of state control as to matters of admiralty and maritime jurisdiction. (*Auth. cit.*) But when Congress did enact a model insurance bill, in the avowed hope that the legislative branches of the various state governments would also adopt it, the "available defenses," as the maritime law had established them, were left unchanged.

Petitioners then refer to the *Jensen* line of cases. First they quote the isolated sentence from *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 309: "Indeed, the *Jensen*

case has already been severely limited, and has no vitality beyond that which may continue as to State workman's compensation laws." They omit the context supplied by that and subsequent opinions.

The next paragraph of the *Standard Dredging Co.* case states: "But in dealing with *unemployment* insurance, 'exclusive federal jurisdiction' is not affected at all. Congress retains power to act in the field, and in the meantime the federal courts have nothing to do with it." (Our emphasis) (*Idem.* 309-310) This statement is not true of *marine* insurance contracts, which are distinctively maritime contracts. And the subsequent judicial history of the sentence Petitioners select for quotation is interesting.

Reading the dictum Petitioners quote, as above, from the *Standard Dredging Co.* case, the learned Court of Appeals for the Second Circuit—while it did not go to the literal extreme of supposing that the several states were now free to substitute their own law for the general maritime law in all but workmen's compensation cases—fell into the error of saying in *Guerrini v. U. S.*, 167 F. (2d) 352, that whether the maritime or state law applies "depends on the forum"; an error which it retracted at the first opportunity in *Hedger Transp. Co. v. United Fruit Co.*, 198 F.(2d) 376 (CA 2), on the authority of *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, *Intagliata v. Ship-owners etc. Co.*, 26 Cal. (2d) 305; 159 P. (2d) 1 (holding that the substantive maritime law governs a cause of action falling within the admiralty and maritime jurisdiction, whether the remedy thereon is sought in a State or a Federal Court); *Colonna Shipyard v. Bland*, 150 Va. 349; 143 S.E. 729; 59 A.L.R. 497 (a similar holding, cited by this Court in the *Garrett* case); and *Jansson v. Swedish American Line*, 185 F. (2d) 212 (CA 1) (a learned and brilliant analysis of the decisions by the Chief Justice of the Court of Appeals for the First Circuit).

Further, the Court of Appeals for the Third Circuit rejected any such interpretation of the dictum of the *Standard Dredging Co.* case as its isolated quotation first suggested to the Court of Appeals for the Second Circuit, as above. *Hawn v. Pope & Talbot, Inc.*, 198 F. (2d) 800 (CA 3). The latter case came to this Court. Petitioners make no reference thereto.

In that case (*Pope & Talbot v. Hawn*, 346 U. S. 406) this Court, rejecting the argument "that Hawn's rights must be determined by the law of Pennsylvania" because he was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law," pointed out that "his right of recovery * * * is rooted in federal maritime law." On that basis it was held (pp. 409-410):

"Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. See e. g., *Garrett v. Moore-McCormack Co.* 317 U. S. 239, 243-264, and cases there cited."

This Court again (pp. 410-411) emphatically rejected the fallacious suggestion that *Erie R.R. v. Tompkins*, 304 U. S. 64, would require the application of state law to a maritime cause of action if the remedy for the substantive maritime right were sought in a state court (a fallacy fully exposed in the *Garrett* case (317 U.S. at 245))²⁹ pointing out also that the substantive law applied in matters of ad-

²⁹ "The source of the governing law applied is in the national, not the state government." *Garrett v. Moore McCormack Co.*, 317 U. S. 239, 245.

miralty and maritime jurisdiction is "not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket." (346 U. S. on 411)

When it is remembered that this Court has held that the contract of marine insurance "sprang from" the general maritime law, is "part" of that law, deriving "all its material rules and incidents" from that law, "by which it is governed" (*Ins. Co. v. Dunham*, 11 Wall. 1, 30-35, *supra*) it seems plain that Respondent's rights under that contract are deeply rooted in the admiralty law and that under the rulings of this Court, reiterated in the *Hawn* case, Respondent's right to rely on that law as the law of the contract cannot be gainsaid.

Petitioners' further suggestion that a contract of marine insurance is "personal and local" has been commented upon. It remains to say that Petitioners' suggestion is not that this contract of marine insurance was local, but that all contracts of insurance, as such, are personal and local, because insurance was not commerce under *Paul v. Virginia*, *supra*. Apparently they recognize that unless all insurance, by nature, is local, then this contract cannot be so described. It was insurance on the hull of a vessel in a Mississippi port when the insurance was wanted, issued by an insurer in Illinois, in favor of assureds located elsewhere, and covering the vessel against navigating perils and full marine risks while it voyaged the navigable waters of the United States in five states. That was not of merely "local concern" in any sense relevant to the admiralty clause of the Federal Constitution, nor in any other sense. Petitioners do not even argue that it was of purely local concern, except on the premise that all insurance is so by nature, citing the irrelevant (and rejected) doctrine of *Paul v. Virginia*.

Petitioners' suggestion (Brief 19) that they were "grocers" and therefore may be presumed to know the law of Texas does not seem persuasive. Whatever they knew (and they did know that they were insuring a navigating vessel, and that they had the services of their insurance man, McKinney), both parties have a right to contract with reference to the law that governs their transaction. Under the decisions of this Court and the other federal courts, this was a maritime contract governed by the general admiralty law. Its face, terms, subject matter and circumstances alike disclose that it was made with reference to that law. "The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts v. Camors*, 115 U. S. 353, 362; *Union Fish Co. v. Erickson*, 248 U. S. 308, 313.

The artificial statutory definition of marine insurance quoted by Petitioners (Brief 19) was adopted for the special purposes of that Act and does not change the meaning of marine insurance as a maritime contract in the Constitutional sense. (Nor could it. *Panama R.R. Co. v. Johnson*, 264 U.S. 375)

The suggestion (Petitioners' Brief 20, 21) that a warranty in a marine contract of insurance against pledging a vessel is not to be governed by the maritime law if the vessel is pledged only by a common law method, seems confused. The maritime contract is that it shall not be pledged; that maritime undertaking would appear to be violated, however the vessel is pledged. (It is stipulated here that this vessel was pledged. R. 23, 24) It is the obligation of the maritime contract that is the subject of the maritime law. (Incidentally, a court of admiralty

will under some circumstances distribute the proceeds of the sale of a vessel to a chattel mortgagee. *The Lottawanna*, 21 Wall. 558, on 583.

The suggestion (Petitioners' Brief 20) that violation of the warranty in a maritime contract of marine insurance as to how the vessel shall be used involves "as much of a characteristic of common law as of admiralty law" exposes Petitioners' position. The insurance contract itself is maritime and that is enough. Further, if the type of use of a vessel on navigable waters of the United States is no concern of maritime law it is difficult to see how anything is.

It will be recognized (although Petitioners fail to state the fact) that the quotation appearing at page 21 of their brief is from a dissenting opinion. The general maritime law is now well-recognized as the articulate voice of the Federal Sovereign, speaking by its legislative or judicial voice. (*Pope & Talbot Inc. v. Hawn*, 346 U.S. 406, 409-411.)

II.

Application of Texas Law as Put Forward and Claimed by Petitioners to Affect the Validity and Effect of This Contract of Marine Insurance, Would Deprive Respondent of Its Constitutional Right to Rely and Depend on the Terms of the Contract According to Their Validity and Effect Under the Substantive General Maritime Law.

The Texas statutes referred to are hereinbefore set out. Two of them are conveniently treated together.

The first (relied on by Petitioners at Brief 13) provides in substance that any contract of insurance payable to any "inhabitant" of Texas and issued by any company "doing business in Texas" shall be governed by its law.

The second (relied on by Petitioners at Brief 10) is argued to invalidate the provision of the policy that it shall be void if the vessel is pledged.

We have heretofore pointed out the peculiar moral risks involved in underwriting marine insurance. We suppose it is evident that in underwriting marine insurance, which is characteristically for substantial sums in favor of strangers on a distant and transitory subject matter, the moral risks are peculiarly great. (Cf. Brief of the learned *amicus curiae*.)

Provisions against encumbering the insured property go to moral risk. (*Sun Insurance Office v. Scott*, 284 U. S. 177 (1931).) The marine underwriter is peculiarly in need of their protection.

According to Petitioners, Texas has said (and validly may say) that such provisions in a maritime contract, forbidding pledge of the vessel—however valid and enforceable against anyone else—shall be void as against any payee who may inhabit Texas. But moral risk is not a matter that varies with habitation.

This maritime contract sprang from the general maritime law—deriving all its essential rules and incidents therefrom; the right arising on that maritime contract under the maritime law was to rely on it as it was written. (See Point I hereof and Brief of *Amicus Curiae*.) The blunt question is whether a state can, by its law, take away that substantive right, deeply rooted in the maritime law. We submit that under Article III, Section 2 of the Constitution, it cannot, and that the repeated decisions of this Court so hold. Among many such cases, see especially: *Pope & Talbot, Inc. v. Hawk*, 346 U. S. 406, 409-411 and *auth. cit.*; *Watts v. Camors*, 115 U. S. 353, 359; *Union Fish*

Co. v. Erickson, 248 U. S. 308, 313; *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443; *Ins. Co. v. Dunham*, 11 Wall. 1, 30.³⁰

Petitioners do not attack the terms of the policy that forbid pledge of the vessel under other Texas laws.

The provision of the policy that the vessel should be used solely for private pleasure purposes was equally a part of this marine policy, a contract derived from and governed by the general maritime law in all its material rules and incidents, as this Court describes it. (See Point I.)

Petitioners agree they violated that term of this policy.

This was a provision contemplating performance by the assureds as to use of a vessel on the navigable waters of the United States in five states. It was a distinctively maritime obligation in every sense.

The right of this Respondent under the maritime law by which a contract of marine insurance is governed is to stand on the plain terms of the contract as they were written, to defend for the breach of those terms. (Point I.)

³⁰ Presumably the absence of any argument that the Texas "causation" statute applies to this provision of the contract arises from Petitioners' recognition that the "causation" statute does not apply to such a breach since, as the leading Texas case puts it (*Home Ins. Co. v. Henderson*, 263 S. W. 650, 652; Tex. Civ. App.), the pledge of the vessel could not "of itself" cause the vessel to sink. Cf. *National Fire Ins. Co. v. Carter*, 237 S. W. 289 (Tex. Com. App.), and *Citizens State Bank v. American Fire & Casualty Co.*, 198 F. 2d 57, 59 and auth. cit.

Petitioners say that Texas can take away that right, by imposing on the Respondent the burden of proving something more, namely, that the admitted violation caused the loss.

No doubt commercial use might in some circumstances cause the loss "of itself." (Cf. n. 30, *supra*.) It is also true, as the *amicus curiae* points out, that the higher risk from commercial use is both physical and moral. (Br. 14.) This acquires point here from the circumstance that this vessel, purchased as a commercial venture (R. 68), had performed only a few such trips in all the time intervening before the loss. (R. 62.) After the loss when the facts came out, it appeared as a venture having "every prospect of failure." (R. 188.)

The rule of the state statute relied on by Petitioners as to this breach is that "Texas enacted a statute requiring the insurance company to prove that the breach of warranty contributed to the loss." (Petitioners' Brief 11.)

That state statute would take away the Respondent's right under the general maritime law to defend on the plain terms of the maritime contract as they were written therein. More, it would do so by requiring that an additional fact should be shown (a fact peculiarly difficult to show with respect to sunken vessels) and impose on Respondent the burden of proving it.

This would seem to go altogether beyond the attempted state change in the maritime law condemned by this Court in *Garrett v. Moore-McCormack Co.*, 317 U. S. 329. In that case a seaman brought suit which was defended on the ground he had given a release of his asserted maritime claim. The maritime law required the party claiming the benefit of the release to sustain the burden of the issue of its fairness; the state law put the burden of that

issue on the other party. The suit was litigated through the courts of the state which applied the state law as to the burden of proof. This Court granted certiorari and reversed for failure to apply the maritime rule as to the burden of proof, holding that rule to be part of the substantive maritime right and beyond the power of the state to change because of the requirement of national uniformity in enforcing rights rooted in the maritime law. (*Ibid.*, 317 U. S. on 244 and cas. there cit. no. 10.)

The right of a party to a contract of marine insurance to defend on its terms is a substantive right. The contract is a maritime contract, if any is. (Point I.) Substantive rights of defense arising on such a contract are deeply rooted in the general maritime law. The state law here attempts to change the substantive right arising under the maritime law on the maritime contract, and require a party thereto to show a fact that is irrelevant to its obligation under the general maritime law, and bear the burden of proving it. That appears clearly to be a more extreme invasion and alteration of the rights arising on the substantive maritime law than that condemned in the *Garrett* case. It is a deprivation of constitutional right under Article III, Section 2. (*Ibid.*, 317 U. S. on 244 and cas. there cit. n. 10, 245, 246.)

In the *Garrett* case, just cited, reliance was on the cases in the *Jensen* line to support the ultimate *ratio decidendi*, stated as follows (317 U. S. on 244):

“In many other cases this Court has declared the necessary dominance of admiralty principles in vindication of rights arising from admiralty law.”

Rights on maritime contracts evidently arise under the general maritime law; the law of the state *loci contractus*

is repeatedly held not to define their validity and effect, as the authorities already cited have shown. It was not the law of Louisiana, but the general maritime law, that controlled the validity and effect of the contract in the *Watts* case, because it was a maritime contract (115 U. S. 353, 359, *supra*). It was not the statutory law of California where the contract was made that controlled the validity and effect of the contract in the *Erickson* case; it was a maritime contract, as to which the Constitution contemplates uniformity of one national law, beyond the power of states to impair by their diverse laws. (248 U. S. 308, 313-314, *supra*.)

In the *Garrett* case, to make the matter plain, this Court added a note to its basic statement of the necessary dominance of admiralty principles in rights arising from the admiralty law, saying (317 U. S. on 244-245 n. 10):

“Disagreement over the Constitutional issues in the *Jensen* line has not extended to this principle. Cf. *The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 43.”

In the *Jensen* case so referred to, the maritime contract was one of employment. The *Jensen* case dealt with the consequences arising from that maritime contract under the maritime law, as pointed out by *Schuede v. Zenith S. S. Co.*, 216 Fed. 566, a case approvingly cited by this Court in the same note with *Jensen* in the *Garrett* case. (317 U. S. on 244-245, n. 10, *supra*.) In the *Jensen* case and other cases in the *Jensen* line there cited to “this principle” the obligation enforced, arising on a maritime contract, was not governed by the statutory law of the state where it was made or performed, but by the general maritime law.

In *Detroit Trust Co. v. The Thomas Barlam*, 293 U. S. 21, 43, referred to as above by the *Garrett* case, this Court said by Mr. Chief Justice Hughes, referring to the admiralty and maritime provision of Article III, Sec. 2:

“But the grant presupposed a ‘general system of maritime law’ which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation. *The Lottawanna*, 21 Wall. 558, 575.”

In the *Hawn* case, *supra*, (346 U. S. 406 at 409) this Court stressed that the right of recovery was “rooted in federal maritime law.” A right of recovery or defense on a maritime contract, a contract that sprang from the law maritime and derives all its material rules and incidents from the maritime law by which is governed (*Ins. Co. v. Dunham*, 11 Wall. 1, 30, *et seq.*, *supra*) is, indeed, “rooted in federal maritime law.”

Petitioners’ Brief is convincing that there is no substantial reply to the foregoing. They inquire (Petitioners’ Brief 20) “If the laws of the 48 States relating to marine insurance are not uniform what will happen to uniformity when the various Federal Judges in this country rule on a marine policy and attempt to allocate common law and maritime law to an insurance contract in order to determine whether or not State insurance statutes are applicable.” That is a good question.

Petitioners here present an aspect of the problem to which the constitutional solution is addressed. Under the authorities referred to, the constitutional solution is the government of maritime contracts by one general maritime law, a substantive national law, that states cannot change. That this is the Constitution’s answer to the problem that

Petitioners recognize as above quoted, appears evident from the decisions of this Court to which we have referred. Petitioners' question does not answer those decisions. It convincingly suggests the reason for them; the reason they themselves announce.

The fact that there is no substantial alternative to the Constitution's answer to Petitioners' problem, as that answer has been reiterated by the decisions of this Court, is emphasized again by the different answer which Petitioners seem to suggest. "We are not dealing here," they say, "with the construction of a perils of the seas clause, or an Inchmarree clause, or a marine watchman clause (citing *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. 2d 121, Cert. Den. 284 U. S. 628) but rather with the validity of State insurance statutes regulating defenses that an admitted foreign (*sic*) insurance company cannot use in order to escape contractual liability." (Cf. *Claflin v. Houseman, Assignee*, 93 U. S. 130, 137, as cited by the *Garrett* case, 317 U. S. at 246, n. 14.) This seems to mean (and especially in conjunction with the citation of the *Aetna Ins. Co.* case) that certain parts of an admittedly maritime contract of marine insurance should be governed by the general maritime law, and other parts by the laws of the several states.

No doubt Petitioners' purpose is to suggest that, in the case put at Petitioners' Brief, p. 20, of one policy covering one shipment by land and water, the solution of the Constitution is imperfect. The Constitution enables the parties themselves to avoid the troubles Petitioners imagine by a separate contract appropriate to the maritime voyage. But the parties themselves cannot achieve uniformity in the law governing the maritime contract.

Petitioners elsewhere suggest that the rule of strict compliance with warranty terms is as characteristic of the "common law" as it is of the maritime law. This would appear to assume that nothing characterizing both the "common law" and the maritime law, is characteristic of either, which would not be true in any event. The assumption seems, also, to ignore more fundamental matters. In a famous phrase quoted by them (but not in connection with the assumption referred to) the "common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign." (Petitioners' Brief, 21) The "common law" in this country is the judicial voices of 48 different state sovereigns. If they were all, at some lucky moment, to hit exactly the same note, and that the note of the maritime law, the maritime law would not thereby lose its identity at that point of the scale. This Court's discussion of *Erie R. R. v. Tompkins*, 304 U. S. 64, occurring at page 245 of the opinion in the *Garrett* case (317 U. S. at 245) would seem to make it plain that the decisive question is: what sovereign is the source of the substantive general maritime law that governs matters of admiralty and maritime jurisdiction—the national sovereign, or 48 state sovereigns? The *Garrett* case itself, and the *Hawn* case that reaffirmed it (346 U. S. at 409, 410), (and the "principle" of the decisions to which they adhere) would seem to have settled it that the substantive general maritime law is the articulate voice of the federal sovereign.

Petitioners' remaining suggestion is that Respondent "agreed" to be bound by the laws of Texas. This is completely answered by the authorities cited and discussed in the brief of the learned *amicus curiae*, pages 38-41, which we need not repeat here. The position there taken is correct. See *Hanover Inc. Co. v. Harding*, 272 U.S. 494, 507-8, 514, 517.

We need only add that it is correct even on the assumption that Respondent was authorized to do business in Texas (which does not appear); and *a fortiori* correct on the actual record.

III.

The McCarran Act Does Not Authorize States to Supersede the General Maritime Law as to the Force and Validity of the Terms of Marine Insurance Contracts, but Was Passed for a Particular and Different Purpose Disclosed by Its Terms and Legislative History. Interpreted and Applied as Petitioners Seek to Interpret and Apply it Here, as a Permission to the States to Revive the Diversity of State Control in the Substantive Admiralty and Maritime Jurisdiction, It Would Defeat the Purpose of Article III, Sec. 2, and Exceed the Powers of Congress.

That the McCarran Act does not and was not intended to have the effect for which Petitioners contend, is shown by the brief of the learned *amicus curiae*, at pages 31-38. We also discussed the matter in our Brief on Reply to the Petition, at pages 32 and following. To save reprinting we refer to the two discussions mentioned. It would pervert the intention of Congress to apply the McCarran Act as Petitioners propose.

Further, in that application the McCarran Act would clearly exceed the power of Congress, (a consideration material also to its interpretation). We refer again to the dis- in this connection. Among many authorities there cited: *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, and *cas. cit.*; *Panama RR. Co. v. Johnson*, 264 U.S. 375 and *cas. cit.*.

IV.

By the Law of Texas, Petitioners Could Not Recover Thereunder in View of All Their Breaches.

The common law of Texas in event of violation of the warranty terms of an insurance policy denies recovery thereon, irrespective of any causal relation between the breach and the loss. *Fidelity Mutual Life Assn. v. Harris*, 94 Texas 25; 57 S. W. 635.

Petitioners admit that the purpose of the Texas "causation statute" was to alter that rule, as stated in *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452 (Petitioners' Brief, 11).

The statute (Petitioners' Brief 4, entitled "Texas Laws Govern Policies") applies by its terms only to "any contract of insurance payable * * * by any insurance company or corporation doing business in this State," etc.

The record does not show that Respondent was such a company or corporation.

The further statute, relied on by Petitioners as invalidating the anti-pledge provision of this policy, applies by its terms only to "Any provision in any policy of insurance issued by any company subject to the provisions of this law," etc. (Petitioners' Brief 4.)

Petitioners have not been made to appear to be subject to the provisions of that law.

The companies subject to that law are defined by it in a preceding section thereof so as to exclude this Respondent and the policy in question. (Cf. *supra* herein, Statutes, Texas Statutes Sec. 4880.)

Said law in the said defining section thereof, by its terms limits the application of that law to companies holding certificate of authority to transact business in Texas, and it does not appear that Respondent was such a company. Further, the last said section limits the application of law on which Petitioners rely to companies holding such certificate and the imposition thereon of supposed agreement as to the transaction of business "in" Texas. It does not appear that this company transacted business in Texas. The defining section of said law in the portion thereof beginning "it being extended" excludes the instant situation under the rule *expressio unius* (and was clearly an acknowledgment of the doctrine of *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121 (CA 5); cert. den. 284 U. S. 628).

The defining section of the law limits it further to companies issuing a policy or contract of insurance "against loss by fire on property within the state."

Texas itself would not allow recovery in view of the admitted breach in selling the vessel. *Citizens State Bank v. American Fire & Casualty Co.*, 198 F. 2d 57, 59 (CA 5); *National Fire Ins. Co. v. Carter* (Tex. Com. App.) 237 S. W. 1089; *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 57 S. W. 635; *Bosemman v. Ins. Co.*, 301 U. S. 196, 206; *Hartford Fire Ins. Co. v. Walker*, 94 Tex. 473, 61 S. W. 711; *Retailers Fire Ins. Co. v. Jackson Gin Co.* (Texas Civ. App.) 10 S. W. (2d) 799.

Moreover, Texas itself would refer this contract to the law of Illinois. *Fidelity Mut. Life Assn. v. Harris*, 94 Tex. 25, 57 S. W. 635; *Washington Ins. Co. v. Shaw*, 180 S. W. 2d 1003, 1004 (Tex. Civ. App.); *Metropolitan Life Ins. v. Greene*, 93 S. W. 2d 1241, 1245 (Tex. Civ. App.).

V.

To Subject Respondent to the Texas Statutes Relied on By Petitioners Would Deprive Respondent of Its Rights Under the Due Process Provision of the Constitution, Article XIV, Amendments, Not To Be Subject to Extra-Territorial Operation of the Laws of Texas to Govern the Validity or Effect of the Transaction in Question.

Nothing appears that would warrant Texas in subjecting this transaction to its law, under the XIVth Amendment.

The vessel was in Texas, from time to time. Her presence there was transitory; it consisted of voyages over the state line from Oklahoma (R. 82) and presence in Texas for the temporary purpose of outfit or repair. (R. 70, 71) She was in Mississippi when the Wilburns bought her.

The policy permitted and contemplated the vessel's presence to some extent in Texas, for Lake Texoma lies in both Texas and Oklahoma, but more in Oklahoma. (R. 108) And the policy permitted and contemplated a voyage from Greenville, the water route traversing parts of Mississippi, Louisiana, Arkansas and Oklahoma. The regular berth of the vessel was Oklahoma. (R. 81) The policy covered her against loss by perils of the seas and other named perils in any part of the permitted waters. (R. 173) She was burned and sank in Oklahoma.

The policy ran to Frank and Henry Wilburn, d/b/a Wilburn Brothers, Denison, Texas. (R. 165) At that time Glen Wilburn was a co-owner. (R. 23) The record does not show where he lived, or "inhabited," at any time before the loss. Effective August 6, 1948, the policy was

amended; the business address previously shown in connection with Frank and Henry Wilburn was eliminated, and the policy made payable to "Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company," no address being shown. (R. 165)

The documents were negotiated, underwritten, bound, issued and delivered, in the State of Illinois as earlier herein described.

The premiums were paid by checks drawn to the order of H. H. Cleaveland Agency (R. 197, 198) of Illinois. (R. 80) They were not paid to McKinney. (R. 197) The said checks were handed to him. (R. 89)

The policy named three offices of the company—San Francisco, Chicago (R. 185) and New York (R. 183). The assured warranted to make reports of loss "to the nearest office of the Company or the agent who shall have issued this Policy". (R. 176) The issuing agent who countersigned the policy and the endorsements was H. H. Cleaveland Agency of Rock Island. (R. 185)

There was a warranty of private pleasure use (R. 173) (which would require performance wherever the vessel went.)

In *Hartford Accident & Indemnity Co. v. Delta Co.*, 292 U. S. 143, a Connecticut corporation insured a Mississippi corporation against loss by dishonesty of an employee of the Mississippi assured "in any position anywhere." The contract was made in Tennessee where both insurer, assured, and the employee, were present. Both the insurer and the assured did business in Mississippi. The employee committed defalcations in Mississippi. A policy condition requiring claim in 15 months from the end of the suretyship was violated; nevertheless, Mississippi allowed re-

covery on the policy on the ground that the condition was contrary to the public policy of Mississippi. It was valid by the law of Tennessee where the contract was made.

Rejecting the argument that the presence of assured in Mississippi when the claim matured and where, it was therefore argued, the payment ought to be made, together with the fact of loss in Mississippi (and that both insurer and assured were doing business there), this Court held that Mississippi could not excuse performance of a condition of the policy by its law, and that the law of Tennessee, the *lex locus contractus*, applied, whereby the violated condition was valid. Pointing out that "performance at most involved only the casual payment of money in Mississippi" (292 U. S. 159) this Court noted further that the liability, which was for the payment of money only, "was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship." (*Idem*, 149) The Court then said:

"It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of the loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not."

See, also, *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434-435; *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507-508, 514, 517.

(This contract was clearly valid in Illinois and Petitioners admitted breaches were clearly fatal under its law. See

Illinois Insurance Code as quoted under "Statutes," *supra*, and *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334; 68 N. E. 551, *supra*.)

The breaches were stipulated, and found by both courts; the judgment was dismissal. If there were no such thing as a general maritime law, the law of Texas could not be applied to excuse the stipulated breaches of this contract, without depriving Respondent of due process and transgressing the restraint which due process imposes on Texas under the XIVth Amendment. Petitioners have shown no applicable law under which the judgment is wrong. Every presumption is in favor of the judgment. *Bagnell v. Broderick*, 38 U. S. 436, 446 (1839); *Townsend v. Jamison*, 48 U. S. 706, 724 (1849).

The argument on the XIVth Amendment was made below but not passed on because other matters were decisive and controlling (R. 279). It is available here in support of the judgment. *Langues v. Green*, 282 U. S. 531, 538-539.

CONCLUSION.

For all the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of dismissal entered by the District Court should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, A.D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,
Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

APPENDIX

Plaintiff's Exhibit 4 (R. 95, 97)

DEPOSITIONS OF

F. B. WHITE
and
E. H. ROSSOW

Rulings of the trial court excluding certain parts of these depositions and limiting others are found at R. 112 to 122, inclusive, as follows:

Deposition Exhibit	Record Page Where Ruling Appears
ROSSOW'S EXHIBIT 37	113
ROSSOW'S EXHIBIT 39	115
ROSSOW'S EXHIBIT 41	116
ROSSOW'S EXHIBIT 47	120
ROSSOW'S EXHIBIT 49	122

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas

Sherman Division

DEPOSITION

of

F. B. WHITE

Deposition taken on Friday, December 23, A. D. 1949, in the office of the H. H. Cleaveland Agency, 1800—Third Avenue, Rock Island, Illinois, before Arno N. Bufe, Notary Public in and for Rock Island County, Illinois.

[Tr. 2] F. B. WHITE, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Arno N. Bufe.

Interrogatory 1. State your name? A. F. B. White.

Interrogatory 2. State your residence? A. Rock Island, Illinois.

Interrogatory 3. What is your business or profession? A. Insurance.

Interrogatory 4. About how long has that been your business or profession? Since 1928.

Interrogatory 5. Referring to the years 1947, 1948 and 1949, what was your business connection, if any, with H. H. Cleaveland Agency? A. A partner.

Interrogatory 6. In the years 1947, 1948 or 1949, or prior thereto, was there a J. B. White connected with H. H. Cleaveland Agency? A. I would say no, because the agency has been in existence for over 80 years, and I have been a member of the Agency since 1928, and since that time there never was anybody of that name in the organization.

[Ti. 3] Interrogatory 7. In the years 1947, 1948 or 1949, was there anyone with the surname "White" connected with the H. H. Cleaveland Agency except yourself? A. No.

Interrogatory 8. Where was the place of business of H. H. Cleaveland Agency in 1947, 1948 and 1949? A. Safety Building, first floor, Third Avenue and Eighteenth Street, Rock Island, Illinois.

Interrogatory 9. State the nature of the business of H. H. Cleaveland Agency? A. Insurance only.

Interrogatory 10. Was that the nature of its business in 1947, 1948 and 1949? A. Insurance as agents only, as it has always been.

Interrogatory 11. In the years mentioned who was there connected with the H. H. Cleaveland Agency who handled wet marine insurance, if anyone? A. Mr. E. H. Rossow and myself were the only ones who handled wet marine insurance.

Interrogatory 12. In those years, 1947, 1948, and 1949, was there anyone else connected with the H. H. Cleaveland Agency who handled, attempted to handle, or had any authority to handle, wet marine insurance? A. Only Mr. Rossow and myself, or Mr. Cleaveland would have, perhaps, had the authority, but he has not been active in the Agency for some years, including the years mentioned.

Interrogatory 13. Who owned the boat "Wanderer" before it was bought by some people named "Wilburn" in June of 1948? A. Robert Marshall and John Shuler were co-owners.

[Tr. 4] Interrogatory 14. What, if anything, was done in connection with the insurance, if any, on the boat "Wanderer," in connection with the transfer of the boat to the Wilburns? A. The insurance that Marshall and Sauler had was transferred to the Wilburns.

Interrogatory 15. If your answer to the next preceding interrogatory is that something was done, state the facts about it? A. On June 4, 1948, I received a long distance telephone call from a Mr. McKinney who gave his address as 307—West Woodard, Dennison, Texas, who informed me that he was an insurance agent in Dennison, Texas, and acting as agent for the Wilburn Brothers who had purchased the Wanderer. He advised me their names were Frank and Henry, co-partners. I have that notation on a carbon of a letter dated May 27, 1948, which was written before this telephone conversation about the insurance when Marshall and Shuler were the insureds. During the course of the conversation, McKinney told me that he had no facilities for writing hull coverage, being located where he was, and wondered if I could arrange with our present carrier to continue this coverage while the Wanderer was being moved down the Mississippi from Greenville up the Red River to the Dennison Dam at Dennison, Texas, and locked through there to Lake Texoma. At the mention of Red River, I told him that I would have to have the authorization from our carrier and would he give me all the information pertaining to this risk so that I might in turn inform our carrier. [Tr. 5] In my letter of June 4, 1948, to the Fireman's Fund Insurance Company, which was our carrier, I outlined the plans, and in this telephone conversation Mr. McKinney told me it was their plan to take the Wanderer down the Mississippi River from Greenville and up the Red River and lock it through the Dennison Dam and use the boat exclusively on Lake Texoma. He advised me further that the Red River was a navigable stream up to this point, because they were letting more than enough water through for power purposes at the Dennison Dam. He asked me to contact our carrier, which I assured him I would and did immediately do so and confirmed it with a letter of the same date.

Interrogatory 16. What kind of a boat was the "Wanderer"? A. It was a pleasure boat, a stern-wheel, house boat.

Interrogatory 17. Was the "Wanderer" built for any particular use? A. It was built for Robert Marshall for pleasure use on the river.

Interrogatory 18. If your answer is in the affirmative to the next preceding interrogatory, for what use was the "Wanderer" built? A. I believe I answered this question with the answer in 17. The answer is the same—for pleasure use only.

Interrogatory 19. To what use was the "Wanderer" put, by those from whom the Wilburns bought her? A. Cruising on the Mississippi River—for pleasure purposes. [Tr. 6] Interrogatory 20. I show you a document of several pages that has been marked D-2-A through D-2-Q. Please identify it if you can. A. I have looked at the document mentioned in this question marked D-2-A through D-2-Q and note that it is a photostatic reproduction of policy Number YA 28579 of the Yacht "A" Form of Coverage issued by the Fireman's Fund Insurance Company, together with the endorsements covering the yacht Wanderer, with the exception of document D-2-D, which is a reproduction of a letter from our office referring to change-over of power in the yacht, that was sent out by one of our clerks under our direction.

Interrogatory 21. Is the page marked D-2-D ever part of any policy of insurance? A. Never.

Interrogatory 22. Do you know how the page marked D-2-D got attached to the rest of the document you have identified? A. No.

Interrogatory 23. Directing your attention to the document D-2-A through Q (except D-2-D) it seems to be a

policy of insurance, with numerous riders attached. Excepting D-2-D will you make that document part of your testimony? A. Yes.

Which said document is attached hereto and is made a part of this record and is in the words and figures following, to-wit:

(Not reprinted--See Record 165-185)

[Tr. 7] Interrogatory 24. Which, if any, of those documents were attached together when originally delivered?

A. If your question refers to the documents originally delivered to Marshall and Shuler, they included the following: D-2-Q, D-2-P, D-2-J, D-2-K, D-2-L, D-2-M, D-2-N, and D-2-O. If the question refers to the documents attached together when originally delivered to the Wilburns, it would include all those that I have already mentioned, plus D-2-I, D-2-H, and D-2-G. All the others, other than those I have mentioned in this letter series, were forwarded to the R. L. McKinney Agency, with the exception of that letter addressed to Wilburn marked D-2-D.

Interrogatory 25. Referring to D-2-K, which appears to be headed "Conditions," what is the fact as to whether they had a line drawn through them when originally delivered? A. Yes.

Interrogatory 26. Tell us about the line referred to in the next preceding interrogatory? A. With reference to the line drawn through the original contract, the policy was issued for boat risk coverage only, and the conditions did not apply when Marshall and Shuler were the owners under this contract. Prior to this time we had issued a regular yacht form of contract to these assureds. However, when the coverage was assigned under policy number Fireman's Fund YA 28579, shown as document D-2-G, effective June the 9th, 1948, that endorsement re-instated all paragraphs under heading, [Tr. 8] "Conditions," and were made a part of this policy.

Interrogatory 27. State the facts about these documents, *D-2-A through D-2-Q*, giving their history? A. If I understand your question, I think I have done so in the answers to previous questions. Mr. Rossow may be able to give something further about it.

Interrogatory 28. Who, if anyone, dealt with you and H. H. Cleaveland Agency on behalf of the Wilburns? A. Mr. R. L. McKinney.

Interrogatory 29. Did any of the Wilburns, or anyone other than McKinney on their behalf, ever have any contact with you or H. H. Cleaveland Agency on behalf of the Wilburns in connection with the insurance for the Wilburns on the boat "Wanderer"? A. No.

Interrogatory 30. Did you ever hear of R. L. McKinney except in connection with what he may have done for the Wilburns in connection with the boat "Wanderer"? A. No.

Interrogatory 31. Was R. L. McKinney ever an agent of yours? A. No.

Interrogatory 32. Was R. L. McKinney ever an agent of H. H. Cleaveland Agency? A. No.

Interrogatory 33. Have you been informed that this boat "Wanderer" is alleged to have been burned on or about *February 25, 1949*? A. Yes.

Interrogatory 34. Assuming the boat "Wanderer" burned on or about February 25, 1949, did R. L. McKinney or any one else advise you prior to that date, or for months [Tr. 9] thereafter, that the boat "Wanderer" was pledged to a bank or to any one else? A. No.

Interrogatory 35. When did you or anyone connected with H. H. Cleaveland Agency first know anything of the boat "Wanderer" being pledged to anyone to secure a debt? A. Not until many months after February 25, 1949, when Mr. Hayes representing the Fireman's Fund

Insurance Company informed me in connection with this lawsuit.

Interrogatory 36. When did you or anyone connected with H. H. Cleaveland Agency first know anything of the boat "Wanderer" being sold to a corporation? A. When Mr. Hayes so informed me and that was at the same time that he told me that the boat had been pledged to a bank.

Interrogatory 37. Did you know anything at all about any commercial use of the boat "Wanderer" when the documents D-2-A through D-2-Q, or any of them, were issued? A. No.

Interrogatory 38. What significance, if any, does the provision of D-2-K that seems to read: "Warranted by the assured that the within named vessel shall be used solely for private pleasure purposes during the term of this Policy and shall not be hired or chartered unless permission is granted by endorsement hereon", has as to the risk and the premium? A. It increases both the risk and the premium if it's being used for commercial purposes, and if there is a breach of that warranty coverage no longer exists on a risk.

[Tr. 19] Interrogatory 39. What significance, if any, does the provision of D-2-K that seems to read: "It is also agreed that this insurance shall be void in case this Policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the Assurers" have as to the risk and premium? A. The insurance was originally issued for the insured interest shown on the contract. Rates were promulgated accordingly but with an assignment or transfer of interest the risk immediately changes complexion. As to pledge, as, for instance, by chattel mortgage or other encumbrance, the risk assumes a hazard entirely different from that originally contemplated and certainly a risk that's much greater. These conditions create definitely a moral hazard.

Interrogatory 40. What effect, if any, does the provision of D-2-K that seems to read: "This entire policy shall be void if the assured has conceded or misrepresented any material fact or circumstance concerning this insurance," and the rest of that paragraph of D-2-K have on the risk and premium? A. The question contains the word, "conceded." It should be "concealed." All hull coverage is written on the basis of good faith and honesty. The word of the assured or his representative is accepted as truth and completeness as to all exposures that might affect the risk and the company assumes and promulgates their rates and coverage based on this [Tr. 11] information and the assumption of its accuracy and completeness.

Interrogatory 41. What is the fact about the relative ease or difficulty of placing maritime insurance, that is to say, getting insurance with respect to boats, in 1948 and 1949? A. It depends when you refer to maritime insurance whether you're referring to commercial coverage or whether you're referring to pleasure type coverage. In the first instance, commercial coverage normally would necessitate a survey and considerable discussion as to rates and coverage before the insurance would become effective. With pleasure craft coverage we use what is known as the Yacht "A" Form Coverage and our companies will normally immediately bind the coverage for us at our request.

Interrogatory 42. Did the Fireman's Fund Insurance Company, so far as you know ever insure commercial risks on boats in 1948 and 1949? A. Not through our agency, and to the best of my knowledge only through our river marine agency, Neare Gibbs and Company of Cincinnati, Ohio.

Interrogatory 43. Or at any other time? A. My answer would be the same as to question 42.

Interrogatory 44. Did you personally, or H. H. Cleaveland Agency, either one, do an underwriting business in 1948 or 1949? A. No.

Interrogatory 45. What was the scope of the authority of H. H. Cleaveland Agency or anyone connected therewith, [Tr. 12] in 1948 and 1949, as to accepting risks as agent of Fireman's Fund Insurance Company? A. If your question refers to hull or wet marine coverage, it has been our policy always to submit the risk first to the Fireman's Fund before binding coverage. We feel that it's our obligation to the company that they be familiar with what their exposure is.

Interrogatory 46. If the authority referred to in the next preceding interrogatory was covered by written document, please produce it and attach it to this deposition as F. B. White Exhibit 1. A. I haven't answered it anyhow.

Which said document was marked F. B. White Exhibit 1, and is in the words and figures following, to-wit:

(Not printed—See original)

[Tr. 13] Interrogatory 47. Did H. H. Cleaveland Agency or anyone connected therewith have any oral or written authority to accept any risk on the boat "Wanderer" for Fireman's Fund Insurance Company in 1948 or 1949? A. No, this would be especially obvious in view of the location of the boat in Greenville.

Interrogatory 48. What was the course of business by which this policy was placed on the boat "Wanderer" for the Wilburns? A. My first contact with this business came with Mr. McKinney's telephone call and by correspondence with the Fireman's Fund and Mr. McKinney and telegrams to McKinney. Mr. Rossow was in Chicago shortly after this telephone conversation and arranged the coverage with the Fireman's Fund.

Interrogatory 49. What was the course of business by which it was increased from \$10,000 to \$40,000? A. This increase was made after Mr. Rossow had taken over the managerial function in this agency.

Interrogatory 50. Do you now think of anything further that might throw light on the situation we have been talking about? A. In answer to this question, I might add that for years I have been interested in the river and river transportation and have tried with varying degrees of success to place some commercial hull coverage and am somewhat familiar with the particular problem involved in placing coverage on commercial boats that might be chartered or used for excursion [Tr. 14] work. The fact of the matter is I never had any success in placing coverage of this type, and if at any time I had knowledge that the *Wanderer* was to be used for anything but pleasure purposes solely I would certainly have notified the company immediately. We have never attempted to use the Fireman's Fund for any wet marine coverage excepting private pleasure use of the yacht. We have never had coverage to the best of my knowledge on any hull of any description that had been pledged by chattel mortgage or any other means. All our commercial hull business has been placed through either the River Marine Agency of St. Louis, Neare Gibbs, Cincinnati, or the Marine Office of America in Chicago.

[Tr. 15] I, Arno N. Bufe of the City of Moline, County of Rock Island and State of Illinois, a Notary Public duly authorized by law to take the deposition of F. B. White, do hereby certify that the said witness, F. B. White, was first duly sworn by me to testify the truth, the whole truth and nothing but the truth in relation to the matters in controversy in the above entitled cause, so far as he

should be interrogated concerning the same; and he thereupon testified as above set forth to written interrogatories propounded to him by me, Arno N. Bufe, Notary Public, his testimony being taken by me in shorthand at the time and place specified, and afterwards transcribed by me.

I further certify that I am not counsel, relative or attorney of either party or otherwise interested in the result of this suit.

In testimony whereof I have hereunto set my hand and attached my notarial seal this 24th day of December, A. D. 1949.

Arno N. Bufe

Notary Public

(Seal)

[Tr. 1]

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Texas

Sherman Division

* * * (Caption—Civil Action No. 505) * * *

DEPOSITION

of

E. H. ROSSOW

Deposition taken on Friday, December 23, A. D. 1949, in the office of the H. H. Cleaveland Agency, 1800 Third Avenue, Rock Island, Illinois, before Arno N. Bufe, Notary Public in and for Rock Island County, Illinois.

[Tr. 2] E. H. ROSSOW, called as a witness, having been first duly sworn, testified as follows:

Direct Examination by Arno N. Bufe.

Interrogatory 1. Please state your name, age, residence and occupation? A. My name is E. H. Rossow. I am 43 years of age. I reside in Rock Island, Illinois, and I am employed as manager of the H. H. Cleaveland Insurance Agency.

Interrogatory 2. What was your business connection in 1947, 1948 and 1949? A. In 1947 I was special agent of the Fireman's Fund Insurance Company in Northern Illinois and left their employ on December the 31st, 1947, to take the position as manager of the H. H. Cleaveland Agency, where I have continued up until this date.

Interrogatory 3. How long have you been in the insurance business? A. Twenty-four years.

Interrogatory 4. What is wet marine insurance? A. Wet marine insurance is insurance covering vessel hulls and vessel cargo and P. and I. coverage, which last is

protection and indemnity insurance—it is protecting the liability of owners of vessels arising out of the operation of [Tr. 3] those vessels.

Interrogatory 5. In 1948 and 1949, who, if anyone, besides yourself and F. B. White had anything to do with handling wet marine insurance? A. If this question as I understand it refers to the business of the H. H. Cleaveland Agency, the handling of wet marine insurance was done only by F. B. White or myself with the exception of routine matters which would be handled by the clerical help under our direction.

Interrogatory 6. I show you a document that has been marked D-2-A through D-2-Q. Give me the history of that document, tell me the facts about it, page by page, referring to each page by the identification mark thereon? A. In examining this document I find that the pages marked D-2-I through D-2-Q in alphabetical order were on the policy as originally delivered to Marshall and Shuler, and this was before I came with the Cleaveland Agency. Page D-2-G, which in point of time, was the first page that came to my personal attention. On June 4, 1948, Mr. White discussed with me a telephone call that he had received from a R. L. McKinney of Dennison, Texas, with reference to the sale of the yacht Wanderer to Frank and Henry Wilburn, notice of which he had sent into the Fireman's Fund Insurance Company by a letter dated that date, but as I was going into Chicago and would visit the insurance company office he asked me to discuss the matter with them, which I did on Tuesday, June the 8th, 1948. [Tr. 4] When Mr. White and I discussed this matter on June 4, 1948, he handed me a copy of a letter dated May 27, 1948, having on it his penciled notations as shown on it, and a copy of a letter of June 4, 1948, addressed to the Fireman's Fund Insurance Company outlining the de-

is of his telephone conversation, and he told me that that what this letter of June 4, 1948, was. The letter of May 27, '48, has no connection with the Wilbarns' interest, but is written as a result of a telephone call from Mr. Robert Marshall's agent informing us that plans had been changed and that the boat would not be moved down to New Orleans from Greenville, Mississippi, as there was a possibility that the yacht would be sold at Greenville, Mississippi. I am giving these copies of said letters to Commissioner.

Which said papers were marked Rossow' Exhibit 1 and Rossow's Exhibit 2, and are in the words and figures following, to-wit:

May 27, 1948

00 Hull 25/50 P & I
 Telephone Frank & Henry, copart.
 Wilburn Bros., Dennison, Tex.
 L. McKinney Agency
 W. Woodard, Dennison, Tex.
 Woman's Fund Insurance Company
 West Jackson Boulevard
 Chicago 4, Illinois
 to: Mr. A. P. Winnebeck,
 Marine Division
 Policy YA-28579
 Robert D. Marshall et al
 re Art:

In response to your letter of May 18 regarding the house- covered under the above captioned policy, I have now learned that the plans have been changed and the boat will be moved down to New Orleans, as originally planned. It may be that the yacht will be sold but it may be done in the harbor at Greenville, Mississippi.

In any event, I informed the insured that if the yacht was moved, we would bind the coverage but they would be required to pay an additional premium based on the hazards surrounding the removal, and also for not in excess of the present amount of insurance which is \$10,000.

I hope that my action meets with your approval and if the yacht is sold or moved, we will notify you as promptly as possible.

Yours very truly,

E. H. Rossow.

ef

June 4, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck
Marine Division

Re: Policy YA-28579
Robert D. Marshall et al

Gentlemen:

Please be advised that as of today Frank and Henry Wilburn, doing business as Wilburn Brothers of Denison, Texas have purchased the "Wanderer" insured under the above policy. It is their plan to take the "Wanderer" down the Mississippi from Greenville, Mississippi to the Red River and proceed up the Red River to the Denison Dam at Denison, Texas. From there, she will be locked through to Texoma Lake.

The information we have is that the Red River is a navigable stream up to this point because they are letting more than enough water through for power purposes at the Denison Dam.

The boat will be used on Lake Texoma exclusively and Wilburn Brothers have asked that we continue this coverage this year on this basis. Of course, this will neces-

sitate the elimination of the Port Clause and the boat will be in year-round operation. Our assured have asked us to cooperate with Wilburn Brothers' agents in Denison, namely, R. L. McKinney Agency, 307 West Woodward, Denison, Texas.

We will appreciate your preparing the necessary endorsements at once so that we may, in turn, forward them to Mr. McKinney.

Very truly yours,

ef

F. B. White.

CC—R. L. McKinney Agency

Walter Hulstedt

[Tr. 5] The next thing under D-2-G in chronological order is a telegram addressed to F. B. White and received in our agency on June 7, 1948, and I am handing this to the Commissioner now.

Which said paper was marked Rossow's Exhibit 3 and is in the words and figures following, to-wit:

(Western Union Telegraph Form)

1948 Jun. 7 AM 10:43

C125 PD:DENISON TEX 7 947A

F B WHITE:

H H CLEVELAND AGENCY 1X:

RE LETTER JUNE 4 WANDERER. PLEASE CONFIRM COVERAGE FIREMAN'S FUND AND WIRE US COLLECT. THANKS:

R L MCKINNEY AGENCY.

[Tr. 6] On Tuesday, June 8, 1948, I saw Mr. A. P. Winnebeck of the Fireman's Fund Insurance Company at his office in Chicago and told him of the change in ownership and the moving of the boat down the Mississippi and up the Red River that was planned. We went over Mr. White's letter of June 4, 1948, to the Fireman's Fund Insurance Company, which I have already given to you. He called someone, but I do not remember whom. It sticks in my mind it was the U. S. Engineers' Office in Chicago, but I am not certain. Whoever he called confirmed to him that the Red River was then in good shape for navigation. We mentioned the fact that the policy as it stood for Marshall and Shuler was restricted to port risk perils and that the new buyer was requesting navigation perils, and after Mr. Winnebeck was assured of the amount of water in the Red River he consented to take the coverage on the basis of the ordinary navigating yacht risk for not only port perils but navigating perils and to transfer the cover to the new owners on the basic yacht form and subject to its normal conditions. These conditions are stated in D-2-K, and the perils are stated in D-2-L. Then a telegram was sent to the R. L. McKinney Agency on June the 8th, 1948, informing them that the Fireman's Fund were binding the transfer, and I am giving a copy of this telegram to you.

Which said paper was marked Rossow's Exhibit 4, and is in the words and figures following, to-wit:

(Western Union Telegraph Form)

June 8th, 1948

R. L. McKinney Agency
307 West Woodard
Denison, Texas

Fireman's Fund binding transfer Yacht Wanderer Texoma Lake and coverage to full marine perils. Endorsements follow.

H. H. Cleaveland Agency.

[Tr. 7] A letter dated June the 11th, 1948, was addressed to the Fireman's Fund Insurance Company and a copy sent to the R. L. McKinney Agency, and I am giving you a copy of this letter.

Which said paper was marked Rossow's Exhibit 5, and is in the words and figures following, to-wit:

June 11, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck,
Marine Division

Re: Policy No. YA-28579
Robert D. Marshall et al
Assigned to Frank and Henry Wilburn,
d/b/a Wilburn Brothers of Denison, Texas

Dear Art:

Following our conversation of Tuesday, June 8, we wired the R. L. McKinney Agency of Denison, Texas as per the copy enclosed in order that the new owner of the boat would know he had full coverage while the boat is being taken down the Mississippi and up the Red River to its new destination and also while at the new location.

We are also anxious to follow through and send the endorsements covering this transfer on to the insured and trust that it will be possible for you to prepare and forward them to us promptly.

Your consideration in this respect will be appreciated.

Yours very truly,

ef

E. H. Rossow.

CC—R. L. McKinney Agency
—Denison, Texas

[Tr. 8] A follow-up letter for the endorsement was addressed to the Fireman's Fund Insurance on June the 24th, 1948, and I am giving you a copy of it.

Which said paper was marked Rossow's Exhibit 6, and is in the words and figures following, to-wit:

June 24, 1948

Fireman's Fund Insurance Co.
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck
Marine Division

Re: Policy No. YA-28579
Robert D. Marshall et al

Gentlemen:

We have been holding this item, awaiting endorsements in connection with the transfer of this boat to Texas and the assignment to Wilburn Brothers.

We assume that in view of the limit of time, this item has been outstanding, you will make a special effort to secure and forward this policy immediately.

We assume that in view of the limit of time, this item

Very truly yours,
E. H. Rossow.

[Tr. 9] Shortly after July 2nd the endorsement was received from the Fireman's Fund Insurance Company, which is document D-2-G attached to the deposition of F. B. White, and this endorsement D-2-G was sent on to the McKinney Agency on July the 6th, 1948, and I give you the letter of transmittal.

Which said paper was marked Rossow's Exhibit 7, and is in the words and figures following, to-wit:

July 6, 1948

R. L. McKinney Agency
307 West Woodard
Denison, Texas

Re: Fireman's Fund Insurance Company
Policy No. YA-28579
Frank and Henry Wilburn

Gentlemen:

Following up our previous telegram and correspondence, we are now pleased to enclose an endorsement dated July 2 and made effective June 9, 1948, correcting the name of the insured and amending the coverage to cover full marine perils and also covering while the boat was being taken from Greenville, Mississippi to Texoma Lake.

Along with the endorsement, I am including an invoice which covers the additional charge for the increase in coverage and transfer of the boat, as well as the unearned portion of the original premium from June 9, 1948 until expiration of the contract on May 22, 1949.

We are pleased to be of service to you in connection with the arrangement of coverage and hope that the endorsement as submitted is satisfactory but if you feel that certain changes should be made, please get in touch with us again.

Very truly yours,

E. H. Rossow.

ef

[Tr. 10] The next thing referring to D-2-G was a letter from the R. L. McKinney Agency dated July the 8th, 1948, and I give you the original of the letter.

Which said paper was marked Rossow's Exhibit 8, and is in the words and figures following, to-wit:

R. L. MCKINNEY AGENCY

Insurance-Bonds

307 West Woodard Street

Denison, Texas

July 8, 1948

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA-28579—Frank and Henry Wilburn
d/b/a Wilburn Bros.

Dear Sirs:

We are in receipt today of endorsement to the above numbered policy.

We do not, however, have the original policy and it was our understanding that the original policy was left in your office.

We would appreciate you checking to see who has the original policy and if you still hold it, forward it to us so that we can go over this coverage with our insured.

Thanking you for your courtesies in this matter, we are,

Yours very truly,

R. L. McKinney Agency

By: R. L. McKinney

RLM:jj

[Tr. 11] I then wrote the R. L. McKinney agency enclosing the policy and renewal certificate identified in the document with Mr. White's testimony as D-2-H through D-2-Q in alphabetical order, and I give you the copy of this letter of transmittal of these documents.

Which said paper was marked Rossow's Exhibit 9, and is in the words and figures following, to-wit:

July 12th, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: YA28579—Frank and Henry Wilburn,
d/b/a Wilburn Bros.

Attention: Mr. R. L. McKinney

Gentlemen:

Promptly upon receipt of your letter of July 8th, we got in touch with Mr. Marshall's representative, and found that he had the policy and renewal certificate in his possession.

We are pleased to send it along to you and regret that these papers were not sent along previously.

Yours very truly,
E. H. Rossow.

EHR/t

[Tr. 12] I acknowledged a letter dated August 6, 1948, from Mr. R. L. McKinney on August the 10th, 1948, and give you the copy of this acknowledgment.

Which said paper was marked Rossow's Exhibit 10, and is in the words and figures following, to-wit:

August 10, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers,
Denison, Texas

Gentlemen:

This is to acknowledge your letter of August 6, enclosing a check in payment of the premium, asking for a correction under the above policy and also reporting a claim for damage.

We are reporting this claim and requesting a correction in name, as well as advising the company of the substitution of the diesel engine and you will hear further from us on these matters in due course.

Thanking you for the premium payment, we are

ef

Very truly yours,
E. H. Rossow.

[Tr. 13] On the same date, August 10, 1948, I also addressed the Fireman's Fund Insurance Company and give you a copy of this letter.

Which said paper was marked Rossow's Exhibit 11, and is in the words and figures following, to-wit:

August 10, 1948

Fireman's Fund Insurance Company

175 West Jackson Boulevard

Chicago 4, Illinois

Attn: Marine Department

Re: Policy No. YA-28579

Wilburn Brothers,

Denison, Texas

Gentlemen:

Attached, you will find a copy of the letter which we have received from the R. L. McKinney Agency in connection with the above captioned policy, requesting an endorsement correcting the name of the insured, reporting a small claim and also advising that there is some remodeling being done including the installation of a marine diesel engine to replace the gasoline engine.

We would like to have an endorsement correcting the name of the insured, your advices regarding the procedure to follow in connection with the claim and also information regarding the substitution of the diesel engine, which may affect the rate used in issuing this contract.

Please give this matter early attention and let your reply come forward.

Very truly yours,

ef

E. H. Rossow.

[Tr. 14] I also give you a letter I received from the Fireman's Fund Insurance Company dated August the 18th, 1948, in response to our letter of August the 10th, 1948.

Which said paper was marked Rossow's Exhibit 11-A, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson

Vice-President and Manager

August 18, 1948

H. H. Cleaveland Agency
3rd Ave. At Eighteenth St.
Rock Island, Illinois

RE: Wilburn Brothers
YA-28579

Gentlemen:

In accordance with your request of August 10th, we are pleased to enclose herewith an endorsement amending the name of the assured as requested.

It is also noted that the assured is making some extensive improvements including the installation of a Marine Diesel Engine to replace the Gasoline engine now on the vessel. If you will advise us when the installation of the Diesel Engine is complete, we will be pleased to allow a prorata credit for the balance of the policy year.

You will also find enclosed a Masters Protest form which we ask that you be kind enough to have completed by the assured and return to us, together with a bill for the repairs. Please return the form to the attention of Mr. Quillen of our Loss Department who will handle the claim to completion.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck

DM

FF

[Tr. 15] I also give you a letter from the Fireman's Fund Insurance Company dated October the 1st, 1948, and referring to their letter of August the 18th, 1948.

Which said paper was marked Rossow's Exhibit 11-B, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson
Vice-President and Manager

October 1, 1948

H. H. Cleaveland Agency
3rd Avenue at Eighteenth Street
Rock Island, Illinois

Claim 806196
Policy No. YA-28579
Assured: Wilburns Boat Co.

Gentlemen:

On August 18th, 1948 Mr. A. P. Winnebeck of our Marine Underwriting Department forwarded you a Masters Protest form, which we asked that you be kind enough to have the assured complete in full and return to us along with the repair bills.

We are wondering at this time if the repairs have been completed, and when we may expect to receive the necessary papers.

Yours very truly,
W. R. Quillen
Claims Division

WRQuillen:es FF

[Tr. 16] On August 19, 1948, I forwarded Page D-2-B of the document included in Mr. White's testimony, and I give you a copy of this letter.

Which said paper was marked Rossow's Exhibit 12, and is in the words and figures following, to-wit:

August 19, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers,
Denison, Texas

Gentlemen:

Following up our letter of August 10 and our reply to your letter of August 6, we are now pleased to enclose an endorsement amending the name of the insured under this policy and along with this, a statement of loss to be completed in connection with the recent claim.

The substitution of a marine diesel engine to replace the gasoline engine on this vessel would entitle the insured to a rate credit and when the installation is complete, please advise us and we will then submit the facts to the company and arrange to secure a pro rata credit for the balance of the policy year.

A stamped, self-addressed envelope is included for the return of the statement of loss.

ef

Very truly yours,
E. H. Rossow.

[Tr. 17] I notice that D-2-A is attached to this same document and this was prepared in response to a letter of March the 2nd, 1948, requesting a copy of Page D-2-B. I give you this letter, which is Mr. R. L. McKinney's request for D-2-A.

Which said paper was marked Rossow's Exhibit 13, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

March 2, 1949

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA 28579—"The Wanderer"

Gentlemen:

Will you please send us a copy of the endorsement to the above policy which amended the named insured to Glen, Frank and Henry Wilburn d/b/a Wilburns Boat Company.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

JJ

[Tr. 18] I forwarded D-2-A to the R. L. McKinney Agency on March the 4th, 1949, and I give you a copy of that letter of transmittal.

Which said paper was marked Rossow's Exhibit 14, and is in the words and figures following, to wit:

March 4th, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Gentlemen:

YA 28579

"The Wanderer"

In reply to your letter of March 2nd, I am pleased to enclose a copy of the endorsement, effective August 6th, 1948, and amending the name of the insured.

I assume that this gives you the necessary information.

Yours very truly,

E. H. Rossow.

EHR/t

Tr. 19] I am now giving you a letter from the R. L. McKinney Agency dated September the 23d, 1948, requesting change in the name of the assured and stating that the same should read:

Glen, Frank and Henry Wilburn
d/b/a Wilburns Boat Company,
as shown on D-2-B.

Which said paper was marked Rossow's Exhibit 15, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

September 23, 1948

H. Cleaveland Insurance Agency
4th Avenue at Eighteenth St.
Rock Island, Illinois

Re: YA-28579—Wilburn Brothers
Denison, Texas

Gentlemen:

We have enclosed herewith endorsement sent us changing named insured under the above policy. The endorsement should read as follows instead of as originally written.

Glen, Frank and Henry Wilburn
d/b/a Wilburns Boat Company
Thanking you for forwarding correcting endorsement,
Sincerely,

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

M:JJ

[Tr. 20] I give you a letter dated September 23, 1948, relating to a small loss.

Which said paper was marked Rossow's Exhibit 16, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

September 23, 1948

H. H. Cleaveland Insurance Agency
3rd Avenue at Eighteenth Street
Rock Island, Illinois

Re: YA-28579—Wilburn Brothers
Denison, Texas

Gentlemen:

We have enclosed herewith Statement of Loss under above policy and regret this statement being so late. This morning we checked over the bill with the insured and questioned in particular the item for 78 gallons of gasoline. He said this much gasoline was used because the Lake Texoma Boat & Dock Company used a gasoline machine for the repairs in doing this work. We also questioned the labor item but Mr. Wilburn said actually they did use this much labor as nearly as they could check and that someone was there watching the work all the time.

Trusting that you find this loss and statement in order, we are,

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

Enc.

[Tr. 21] I now give you a copy of my letter of September 29, 1948, in which I enclosed the corrected endorsement changing the name on Page D-2-B to Glen, Frank and Henry Wilburn, d/b/a Wilburns Boat Company as requested by the R. L. McKinney Agency.

Which said paper was marked Rossow's Exhibit 17, and is in the words and figures following, to-wit:
September 29, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

In response to your letter of September 23, we have corrected the endorsement changing the name of the insured and return it herewith.

We have also submitted to the Fireman's Fund Insurance Company the statement of loss for their further consideration.

In a previous letter in connection with this same policy, you explained that the insured was substituting a diesel engine and we wrote and advised that as soon as the substitution was complete, to give us this information so that we could submit it to the company for a credit in rate.

We have not heard from you in regard to this particular feature but assume that the matter is still in the process and that you will advise us as soon as the installation is completed.

Yours very truly,
E. H. Rossow.

ef

[Tr. 22] I now give you a letter from R. L. McKinney dated October 1, 1948, wherein he informed us that a diesel engine had been installed.

Which said paper was marked Rossow's Exhibit 18, and is in the words and figures following, to-wit:

R. L. McKINNEY AGENCY

Insurance-Bonds

307 West Woodard Street

Denison, Texas

October 1, 1948

H. H. Cleaveland Agency
3rd Ave. at Eighteenth St.
Rock Island, Illinois

Re: Policy Number YA 28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Thank you for your letter of September 29.

The insured has advised this morning that his diesel engine has been installed and if you will have who ever is to inspect the yacht contact us we will contact the insured and make the necessary arrangements.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

[Tr. 23] I now give you a copy of my letter of October 4, 1948, addressed to the Fireman's Fund Insurance Company and informing them that a diesel engine had been installed and asking for premium credit for this installation.

Which said paper was marked Rossow's Exhibit 19, and is in the words and figures following, to-wit:

October 4, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois
Attn: Mr. Arthur P. Winnebeck
Marine Department

Re: Policy No. YA-28579
Wilburn Brothers, Denison, Texas

Dear Art:

Following up our previous letter explaining that a diesel engine was being installed in the boat insured under the above captioned policy, we are now pleased to report that the engine has now been installed and we trust that with this information, you will be in a position to endorse the policy giving the insured credit for this installation.

Yours very truly,

ef

E. H. Rossow.

[Tr. 24] I am giving you a copy of my letter of September 29, 1948, addressed to the Fireman's Fund Insurance Company and enclosing the Master's Protest and Statement of Loss referred to in Mr. R. L. McKinney's letter of September 23, 1948, which has previously been given to you.

Which said paper was marked Rossow's Exhibit 20, and is in the words and figures following, to-wit:
September 29, 1948

Fireman's Fund Insurance Company

175 West Jackson Boulevard
Chicago 4, Illinois

Re: Policy No. YA-28579

Wilburn Brothers

Attn: Mr. Quinn,
Loss Department

Gentlemen:

Following up a report of claim under the above captioned policy, we are now pleased to enclose a Master's Protest and Statement of Loss, together with a copy of the bill and a letter which we received from the Agency down in Denison, Texas, in connection with this claim.

We trust that with this information, you will be in a position to proceed with the closing of his claim and trust that a check in payment of the loss will come forward promptly.

Yours very truly,

E. H. Rossow.

ef

[Tr. 25] I now give you a copy of my letter of October the 28th, 1948, addressed to the R. L. McKinney Agency enclosing a check in the amount of \$15.95 which is the premium refund on account of the installation of the diesel marine engine and reflected on Page D-2-C of the document attached to Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 21, and is in the words and figures following, to-wit:

October 28, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

We are pleased to enclose our check in the amount of \$15.95 which represents the return premium under this contract due to the change-over from gasoline to diesel motor.

In addition to this, we are also pleased to enclose a check from the Fireman's Fund Insurance Company in the amount of \$341.35 which represents payment under the claim for damage to the boat.

We hope that the checks, as submitted, will be found satisfactory but if there is any question, please let us know.

Very truly yours,

ef

E. H. Rossow.

[Tr. 26] I give you a copy of our letter of October 27, 1948, addressed to Wilburn Brothers signed by E. M. Joens, which is the same as Page D-2-D of the document included with Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 22, and is in the words and figures following, to-wit:

October 27, 1948

Wilburn Brothers,
Denison, Texas.

Re: Fireman's Fund Insurance Co.
Policy YA-28579

Gentlemen:

Enclosed herewith please find copy of endorsement to attach to the above policy including coverage on a new Diesel Marine Engine which replaces a gasoline engine. A refund of \$15.95 is allowed.

If you have the serial number of the Diesel Engine, would you please advise us for completion of our files?

Thanking you, we are

Yours very truly,
H. H. Cleaveland Agency
E. M. Joens.

emj
encl

[Tr. 27] I give you a letter dated October 18, 1948, which we received from the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 22-A, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

E. D. Lawson
Vice-President and Manager

October 18, 1948

Mr. E. H. Rossow
c/o H. H. Cleaveland Agency
Third Avenue at Eighteenth St.
Rock Island, Illinois

Re: Policy YA-28579
Wilburn Brothers

Dear Ernie:

In accordance with your request of October 4th, we are pleased to enclose herewith an endorsement allowing the pro-rata return premium of the annual \$25 credit due for diesel motors.

You will note that we have left the engine and serial motors blank in the attached endorsement, and we ask that you kindly have the assured fill in this information and sign and return one copy for the completion of our records.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck
lae FF

[Tr. 28] I give you a letter dated December the 14th, 1948, from the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 22-B, and is in the words and figures following, to-wit:

FIREMAN'S FUND INSURANCE COMPANY

Western Department

175 W. Jackson Boulevard

Chicago-4

E. D. Lawson

Vice-President and Manager

December 14, 1948

H. H. Cleaveland Agency

3rd Ave. 18th St.

Rock Island, Illinois

RE: Wilburn Brothers

YA-28579

Gentlemen:

Under date of October 18th, we passed along an endorsement providing for a return premium of \$15.95 under the above policy and ask that you be kind enough to have the assured sign and return one copy and in addition give the engine and motor numbers of the diesel marine engine installed on the vessel insured under this policy to us.

As yet, we do not appear to have received the signed copy and information requested, and since quite some time has elapsed since the endorsement was passed along, we would appreciate your early attention to this matter.

Yours very truly,

A. P. Winnebeck

Marine Division

A. P. Winnebeck

DM

FF

[Tr. 29] I now give you a letter dated December the 14th, 1948, from R. L. McKinney stating that the insured has an investment of \$40,000.00 in this yacht at the present time and asking us advise what rate would be charged to increase the coverage to \$40,000.00. There are my pencil notations on the bottom of the letter of December the 14th, 1948, showing that a telegram was sent to the R. L. McKinney Agency estimating the cost of the additional insurance, and I also give you a copy of the telegram itself, dated December 20, 1948.

Which said letter was marked Rossow's Exhibit 23, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

December 14, 1948

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Firemen's Fund Policy YA 28579
Wilburn Brothers

Dear Sir:

The above named insured has an investment of \$40,000.00 in this yacht at the present time and we will appreciate you advising what rate will be charged to increase the coverage to \$40,000.00 which would amount to an additional \$30,000.00.

In addition to the CO 2 extinguishing system and the extinguishers which were on the yacht, our insureds have installed two fire hydrants and pumps with 50 feet of hose on each, each pump having a pressure of 40 to 50 pounds.

Of course the water for these hoses would be pumped directly out of the lake. They also have two additional 5 pound CO 2 extinguishers and 4 quart size tetrachloride extinguishers.

All the additional equipment has been approved by the Coast Guard on their last inspection.

We will appreciate your early advices.

Yours very truly,

R. L. McKinney Agency

By: R. L. McKinney

Which said copy of telegram was marked Rossow's Exhibit 24, and is in the words and figures following, to-wit:

WESTERN UNION

December 20, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Estimate cost of Thirty Thousand additional Two Hundred and Seventy Five Dollars unexpired term. Binding this amount. Please advise.

H. H. Cleaveland Agency

[Tr. 30] I now give you a copy of my letter of December the 22d, 1948, addressed to the Fireman's Fund Insurance Company confirming our telephone conversation in regard to a rate for the increase in coverage to \$40,000.00. In our telephone conversation with the Fireman's Fund Insurance Company the binder was authorized at the rate mentioned in the letter after we had read to the Fireman's Fund on the telephone Mr. R. L. McKinney's letter of December 14, 1948. The telephone conversation referred to in this letter was on December 20, 1948, and was one I had with Mr. A. P. Winnebeck of the Fireman's Fund Insurance Company. This letter was dictated by me on December 21, 1948, but transcribed by my secretary on December 22, 1948, dated December 22, 1948.

Which said paper was marked Rossow's Exhibit 25, and is in the words and figures following, to-wit:

December 22, 1948

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois
Attn: Mr. A. P. Winnebeck
Marine Department
Policy No. YA-28579

Gentlemen:

This is to confirm our telephone conversation of yesterday wherein you quoted a rate of 2.175 to be used in increasing the coverage under this policy from \$10,000 to \$40,000.

We submitted this rate to the insured and explained that we were binding the additional insurance and as soon as we have his instructions, we will write you further.

Very truly yours,

ef

E. H. Rossow.

requesting the copy of the endorsement which is Page D-2-C [Tr. 31] I now give you a copy of my letter of December the 16th, 1948, addressed to the R. L. McKinney Agency of the document included with Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 26, and is in the words and figures following, to-wit:

December 16, 1948

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Policy No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Back in October, we sent you an endorsement for the above policy showing a return premium of \$15.95 which represented the saving because of the substitution of the diesel engine.

The endorsement was in duplicate and a copy was to be signed and returned along with the engine and motor numbers of the diesel engine.

We hope that you still have this endorsement in your possession and trust it will be possible for you to complete and forward it.

ef

Very truly yours,
E. H. Rossow.

[Tr. 32] I now attach a letter from the R. L. McKinney Agency dated December the 21st, 1948, acknowledging my telegram of December 20th, and asking that the policy be endorsed increasing the coverage by \$30,000.00.

Which said paper was marked Rossow's Exhibit 27, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

December 21, 1948

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: YA 28579 - Wilburn Brothers

Dear Sirs:

Thank you for your telegram of December 20. Please endorse the above policy increasing the coverage by \$30,000.00.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney, Jr., JJ.

JJ

[Tr. 33] I now give you a copy of my letter of December 30, 1948, addressed to the Fireman's Fund Insurance Company requesting the endorsement increasing the amount by \$30,000.00 and making the total coverage \$40,000.00.

Which said paper was marked Rossow's Exhibit 28, and is in the words and figures following, to-wit:

December 30th, 1948

Fireman's Fund Insurance Company
Insurance Exchange Building
Chicago, Illinois

Attn: A. P. Winnebeck
Pol. No. YA-28579
Wilburn Brothers
Denison, Texas

Gentlemen:

Following up our letter of December 22nd, we have now received a request to endorse this Policy increasing the amount by \$30,000 and making the total coverage \$40,000. Based on the rate of \$2.175 which you quoted during our telephone conversation, I have estimated the cost for this additional insurance to be \$275.00 for the unexpired term, and have so advised the insured.

I assume that you will agree with my figures in this respect and send along the endorsement accordingly.

Yours very truly,
E. H. Rossow.

EHR/t

[Tr. 34] I give you a letter dated December the 28th, 1948, from the Fireman's Fund Insurance Company confirming the binding of the \$30,000.00 additional insurance at a rate of 2.175.

Which said paper was marked Rossow's Exhibit 29, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

December 28, 1948

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

c/o H. H. Cleaveland Agency

Third Avenue at 18th Street

Rock Island, Illinois

Re: Wilburn Brothers

Policy YA-28579

Dear Ernie:

This is to acknowledge receipt of yours of December 22nd and to confirm binding an additional \$30,000 of insurance at a rate of 2.175 under the above policy.

As you can readily realize, this tremendous increase in the valuation of this vessel comes as somewhat of a surprise and we are, of course, anxious to substantiate the value of this vessel at an early date. We would suggest that you request the assured to have a competent marine surveyor inspect the vessel, and send us a copy of the report together with the surveyor's estimate of its present day value, or if there is no surveyor available, a new completed yacht application together with bills and invoices

for the work done and for the new installations completed would probably give us enough information to substantiate the value claimed by the assured.

If this houseboat actually is worth \$40,000, then we shall have to either increase the amount of insurance or amend the valuation clause in the policy, thereby making the assured a coinsurer.

In view of the above considerations and since it has been necessary to secure reinsurance on the additional amount of insurance required, we are, of course, extremely anxious to be advised as soon as possible whether or not our quotation has been accepted by the assured, and to obtain the required documents or survey to give us some idea of the actual market value of this boat.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck
lae FF

[Tr. 35] I now give you a letter from the Fireman's Fund Insurance Company dated January 3, 1949.

Which said paper was marked Rossow's Exhibit 30, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

January 3, 1949

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

Third Avenue at 18th Street

Rock Island, Illinois

Re: Policy YA-28579

Wilburn Brothers

Dear Mr. Rossow:

Thanks for your letter of December 30th in connection with the above.

However, we arrive at an additional premium of \$234.01 developed as follows—annual premium on valuation of \$40,000. at a rate of 2.175, \$870.00; annual premium on \$10,000 at a rate of 3.125, \$312.50—the difference, \$558.50; pro-rata percentage .419 or \$234.01.

It would appear that you have merely computed the additional \$30,000. at the new rate then pro-rated the additional charge to arrive at your \$275.00.

However, in view of our explanation of the proper way to arrive at this charge, we will assume that you would prefer to have us put through the additional as \$234.01 and we would appreciate your confirmation.

Yours very truly,
A. P. Winnebeck
Marine Division

A. P. Winnebeck

lae

FF

[Tr. 36] I now give you a copy of my letter dated January 4, 1949, addressed to the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 31, and is in the words and figures following, to-wit:

January 4, 1949

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attn: Mr. A. P. Winnebeck,
Marine Division
Policy YA-28579
Wilburn Brothers

Gentlemen:

In response to your letter of January 3, we are pleased to learn that your figures have developed a lesser additional premium for the increase in amount. You may prepare the endorsement accordingly.

Incidentally, a previous endorsement allowing a return premium of \$15.95 for the installation of a diesel marine engine, and which was to be signed and returned, has been lost. If you will send along two additional copies of this endorsement, we will follow through for the necessary signature.

Very truly yours,
E. H. Rossow.

ef

[Tr. 37] I now give you a letter dated January 18, 1949, from the Fireman's Fund Insurance Company enclosing the endorsement increasing the amount of insurance to \$40,000.00 and this endorsement so enclosed shown on Page D-2-F of the document included in Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 32, and is in the words and figures following, to-wit:

Fireman's Fund Insurance Company
Western Department
175 W. Jackson Boulevard
Chicago-4

January 18, 1949

E. D. Lawson

Vice-President and Manager

Mr. E. H. Rossow

Third Avenue at 18th Street

Rock Island, Illinois

Re: Wilburn Brothers

Policy YA-28579

Dear Ernie:

We are now pleased to enclose herewith endorsement increasing the amount of insurance hereunder to \$40,000. effective December 20th. We trust you will find the endorsement to be in order.

We wish to refer you to our letter of December 28th concerning a Marine survey or new completed application on this yacht, and of course, we are most anxious to get this information as soon as possible.

We are also enclosing two extra copies of endorsement dated October 4, 1948 and we request that you be kind enough to have the sign and return one copy at an early date.

A. P. Winnebeck
lae FF
Enc.

Yours very truly,
A. P. Winnebeck
Marine Division

[Tr. 38] I now give you a copy of my letter of January 25, 1949, addressed to the R. L. McKinney Agency and enclosing the endorsement which is shown on Page D-2-F of the document attached to Mr. F. B. White's testimony.

Which said paper was marked Rossow's Exhibit 33, and is in the words and figures following, to-wit:

January 25, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas
Policy No. YA-28579
Wilburn Brothers
Gentlemen:

Following up your request of December 21, we are now pleased to enclose an endorsement increasing the amount of this policy to \$40,000 and are happy to explain that we were successful in securing this additional coverage for a premium less than we previously quoted.

In addition to this endorsement, we are including a duplicate set of the endorsement showing the installation of the diesel marine engine which we would like to have completed by including the engine number and a copy signed by the insured returned for submission to the Fireman's Fund Insurance Company.

Because of the additional increase in value of the boat insured, the company asks that the assured have a competent marine surveyor inspect the vessel and complete the attached application and I hope that you will be in a position to arrange to have this done.

We trust that this matter has been handled to your satisfaction and await your reply.

Very truly yours,
E. H. Rossow.

ef

[Tr. 39] I now give you a letter of December 31, 1948, which I received from R. L. McKinney.

Which said paper was marked Rossow's Exhibit 34, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

December 31, 1948

H. H. Cleaveland Agency
Rock Island, Illinois
Attn: Mr. E. H. Rossow
Re: Policy No. YA-28579

Wilburn Brothers
Denison, Texas

Dear Sir:

In reply to your letter of December 16 we wish to advise that we have no record of receiving the endorsement substituting the diesel engine on this boat. We did, however, receive the check.

If you will forward us duplicates of this endorsement we shall be glad to have them signed and returned.

Yours very truly,
R. L. McKinney Agency
By: Robt. L. McKinney

JJ

[Tr. 40] I now give you a letter of February 4, 1949, from the R. L. McKinney Agency.

Which said paper was marked Rossow's Exhibit 35, and is in the words and figures following, to-wit:

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

February 4, 1949

H. H. Cleaveland Agency
Rock Island, Illinois
Re: YA-28579
Wilburn Brothers

Gentlemen:

We have enclosed herewith signed copy of endorsement to above policy indicating a diesel engine has been installed replacing the gasoline engine.

Yours very truly,

R. L. McKinney Agency
by: Robt. L. McKinney

RLM:JJ

Enc,

[Tr. 41] I give you a copy of my letter of February the 11th, 1949, addressed to the Fireman's Fund Insurance Company.

Which said paper was marked Rossow's Exhibit 36, and is in the words and figures following, to-wit:

February 11, 1949.

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attention: Mr. Arthur P. Winnebeck
Gentlemen:

Policy No. YA28579

Wilburn Brothers

We are now pleased to enclose a signed copy of the endorsement of October 4 showing the replacement of the gasoline engine in connection with the yacht insured under this policy and assume that with this information, the file in connection with this item will be completed.

Very truly yours,
E. H. Rossow.

ef

[Tr. 42] Interrogatory 7. Did R. L. McKinney, or anyone claiming to be R. L. McKinney, or anybody on behalf of the Wilburns, ever talk to you about that document or any part of it, or the risk that it purports to cover? A. No. My answer refers to D-2-A through D-2-Q included with Mr. F. B. White's testimony.

Interrogatory 8. Did anyone named Wilburn, or anyone claiming to be so named, ever talk to you about D-2-A through D-2-Q, or the risk it purports to cover, face to face or over the telephone? A. No.

Interrogatory 9. Did you ever know of Fireman's Fund Insurance Company writing a commercial wet marine hull insurance policy? A. No.

Interrogatory 10. Did H. H. Cleaveland Agency while you have been connected with it ever have general authority to bind Fireman's Fund Insurance Company wet marine hull or protection and indemnity risks? A. No.

Interrogatory 11. What authority, if any, did it have as to the subject matter mentioned in the next preceding interrogatory? A. As I understand the authority given us by the Fireman's Fund Insurance Company contract, a copy of which is attached to Mr. R. B. White's testimony, our binding restrictions were limited to Rock Island and vicinity.

Interrogatory 12. When any of the documents D-2-A through D-2-Q were issued, what knowledge did you or anyone connected with your agency have, that the boat "Wanderer" had [Tr. 43] been or would be used for any commercial purpose, or had been or would be pledged as security for debt, or had been or would be sold by the Wilburns? A. None.

Interrogatory 13. What is the fact as to whether or not all terms and endorsements on the document D-2-A

through D-2-Q that were asked for on behalf of the Wilburns were placed on the document and there appear?

A. They were.

Interrogatory 14. Do you now think of anything else that might throw any light on the situation? A. No, I can't think of anything else that might throw any light on the situation.

Cross-Examination by Arno N. Bufe

[Tr. 44] Cross-Interrogatory No. 1. Please attach to your answers to this deposition copies of all communications passing between the H. H. Cleaveland Agency of Rock Island, Illinois, and R. L. McKinney Agency of Denison, Texas, with respect to the yacht "Wanderer" or any insurance for the benefit of the Wilburn Brothers or Wilburn Boat Company? A. The greater part of the correspondence requested in this question has been attached to my previous testimony, and I now give you all the rest.

Which said papers were marked Rossow's Exhibits 37 through 45, inclusive, and are in the words and figures following, to-wit:

[EXHIBIT 37] WESTERN UNION
RLCO16 PD-DENISON TEX 25 817A
H. H. CLEAVELAND AGENCY-RL

1949 FEB 25 AM 9:14
-WANDERER, POLICY NUMBER YA 28579 WILBURN
BROTHERS BURNED TODAY. ADVISE IF YOU
WANT US TO GET ADJUSTER ON IT.

R L MCKINNEY AGENCY.
—YA 28579—

[EXHIBIT 38]

WESTERN UNION

FEBRUARY 25, 1949

R. L. McKINNEY AGENCY
307 WEST WOODARD STREET
DENISON, TEXAS

HAVE CONTACTED FIREMAN'S FUND REGARD-
ING LOSS OF WANDERER. THEY ARE CONTACT-
ING GENERAL ADJUSTMENT BUREAU, DALLAS.

H. H. CLEVELAND AGENCY

[EXHIBIT 39]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

August 6, 1948

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Policy Number YA 28579
Wilburn Brothers, Denison, Texas

Dear Sirs:

We have enclosed herewith check in payment of premium on above policy amounting to \$419.56 and regret that the insured was so slow in getting this check to us but they were busy bringing the boat up the river, getting it over the dam and back around into Lake Texoma and wanted to go over the policy with us before paying the premium.

Please endorse the policy to the name of Glenn, Frank and Harry Wilburn d/b/a Wilburns Boat Company.

In coming up the river this boat struck a sand bar and damaged two planks in the hull which the insured has had the Texoma Boat & Dock Company survey and repair. We don't believe the damage amounts to very much and trust that this manner of handling will be satisfactory to you. The Lake Texoma Boat & Dock Company do a very nice job and are competent to handle this type of work. There are two yacht repair businesses on the Lake at the present time.

This repair had to be done promptly as the boat was reinspected by the Coast Guard and they insisted that this be done at that time so they could approve the hull before it was put on the Lake and they have approved the hull and this repair.

These insureds are doing some slight remodelling including the installation of a Marine diesel engine to replace the gasoline engine which has been on the boat. It might be that the Firemen's Fund will want their Dallas Marine man to inspect the boat when this work has been completed.

(Paragraph quoted and, stricken out, on objection at the trial at R. 115 omitted here.)

Thanking you for your courtesy in this matter, we are,

Yours very truly,

R. L. McKinney Agency

By: R. L. McKinney

RLM:JJ

[EXHIBIT 40]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

February 25, 1949

AIR MAIL

H. H. Cleaveland Agency
Rock Island, Illinois

Re: Firemens Fund Policy YA 28579
Wilburn Brothers - "WANDERER"

Dear Sirs:

The above insured reported to us this morning that this yacht burned about 1:10 A.M. today.

Jack Bland, night watchman at the Burns Run Resort, off of which the yacht was moored called our insured at 1:10 A.M. advising that the boat was on fire and Henry and Frank Wilburn got out to the Lake at 1:30. When they arrived, the top structure had burned down to the deck level and they got in a boat with some fire extinguishers and had started toward the Wanderer in an attempt to put out the fire when it exploded and sank.

Frank and Alton Wilburn and their engineer moved the yacht from the Texoma Boat and Dock Company on the Texas side where it had been temporarily during our recent ice storm in January for protection from the weather to this mooring on the Oklahoma side about 5:00 P. M. Tuesday, February 22 and the yacht was in good shape. This buoy is about 300 feet off shore.

One of the Wilburn men have been going out each day to inspect it to see that everything was alright. Frank Wilburn had inspected the boat about 4:30 P.M. yesterday, February 24th and the boat was in good shape at that

time and he noticed nothing wrong. The fire apparently from some cause must have started between midnight and 1:00 this morning.

There is a Firemens Fund Office in Dallas and we have forwarded a copy of this letter to them. Mr. C. E. DeWitt, 928 Kirby Bldg., Dallas, Texas, a marine adjuster has handled a number of losses up here recently for Frank Rimmer, Marine General Agent in Dallas. The General Adjustment Bureau Office in Sherman has also handled some losses.

Please advise any way we can be of assistance.

Yours very truly,
R. L. McKinney Agency
By: R. L. McKinney

RLM:JJ

[EXHIBIT 42]

May 27, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Re: Policy YA-28579
Wilburn Bros.

Gentlemen:

We are pleased to acknowledge receipt of your letter of May 23 with reference to the claim under the above policy and we are passing the original of this letter on to the company, as you requested.

Very truly yours,
ef E. H. Rossow.

[EXHIBIT 43]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodward Street
Denison, Texas

July 8, 1949

H. H. Cleaveland Agency
Rock Island, Illinois
Re: Policy No. YA-28579
Wilburn Boat Company

Dear Sirs:

We would appreciate having any information you have been able to obtain about the status of this loss.

We have been under considerable criticism due to the fact that we more or less obtained the insurance for these insureds and haven't even been able to get them any information on the company's thought on the matter.

Thanking you for your continued cooperation, we are

Yours very truly,

R. L. McKinney Agency

By: Robt. L. McKinney

RLM:JJ

EXHIBIT 44]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

October 21, 1949

L. H. Cleaveland Agency

Rock Island, Illinois

Dear Sirs:

We have misplaced in our files our letter of transmittal to you on the survey on the yacht, "Wanderer", insured under the Fireman's Fund Policy No. YA-28579.

This survey was sent to you at the request in your letter of January 25, 1949 and should have been received in your office in a comparatively short time after that date. We have enclosed a self-addressed envelope for your convenience and would appreciate your sending us this information.

Yours very truly,

R. L. McKinney Agency

By: Robt. L. McKinney

M:cjc

enclosure

[EXHIBIT 45]

R. L. McKinney Agency
Insurance-Bonds
307 West Woodard Street
Denison, Texas

October 25, 1949

H. H. Cleaveland Agency
Rock Island, Illinois

Dear Sirs:

In our letter to you last week on the Wilburn Boat Company for whom you insured the yacht "Wanderer" we did not apparently make our letter very clear, all we want to find out from you is the date you received the survey we prepared on this yacht.

The secretary in our office at the time this was sent to you, prepared and mailed this survey on February 7, 1949. We still find no letter for transmittal in our files and therefore would appreciate your sending us this information.

Yours very truly,
R. L. McKinney Agency
By: Robt. L. McKinney

RLM:cjc

[Tr. 45] Cross-Interrogatory No. 2. Please attach to your answers to this deposition copies of all communications passing between the office of H. H. Cleaveland Agency of Rock Island, Illinois and the Fireman's Fund Insurance Company with respect to the yacht "Wanderer" insurance in favor of the Wilburn Brothers or in favor of Wilburn Boat Company? A. The greater part of the correspondence requested in this question also has been attached to my previous testimony, and I now give you all the rest.

Which said papers were marked Rossow's Exhibits 46 and 47, and are in the words and figures following, to-wit:

[EXHIBIT 46]

October 27, 1949

R. L. McKinney Agency
307 West Woodard Street
Denison, Texas

Gentlemen:

Your letter of October 21 addressed to this Agency has been sent on to the Fireman's Fund Insurance Company as they have our file in connection with the subject matter.

Yours very truly,
E. H. Rossow.

ef

[EXHIBIT 47]

March 2nd, 1949

Fireman's Fund Insurance Company
Insurance Exchange Building
Chicago, Illinois
Attention: Ray Harding
Loss Department

Gentlemen:

Wilburn Brothers
Policy No. YA-28579

Following up our telephone call reporting the loss of the yacht "Wanderer" insured under this policy, we are now enclosing a copy of the letter which we received from the McKinney Agency, outlining the circumstances surrounding the fire.

We assume that this information will be of value to you, and if we can be of any further assistance in connection with this claim, please let us know.

Yours very truly,
E. H. Rossow,

EHR/t

[Tr. 46] There are no communications passing between the office of H. H. Cleaveland Agency of Rock Island, Illinois, and the Fireman's Fund Insurance Company with respect to any yacht Wanderer insurance in favor of Wilburn Boat Company.

And Thereupon Rossow's Exhibits 48, 49, and 50 were marked, and are in the words and figures following, to-wit:

May 27, 1949

[EXHIBIT 48]

Fireman's Fund Insurance Company

175 West Jackson Boulevard

Chicago 4, Illinois

Attention: Mr. Ray Harding,

Loss Department

Re: Wilburn Bros.

Policy No. YA-28579

Gentlemen:

Enclosed, you will find the original of a letter which we received from the R. L. McKinney Agency along with our acknowledgment and with reference to the claim under this policy.

Incidentally, you never did return our correspondence in connection with the various arrangements of insurance coverage under this contract and we would like to have you send this correspondence on to us so that our file will be complete.

Very truly yours,

E. H. Rossow.

ef

[EXHIBIT 49]

Denison, Texas,
March 23, 1949

R. L. McKinney Agency,
307 W. Woodard Street,
Denison, Texas,

H. H. Cleaveland Agency,
Western Marine Department
A-838-175 W. Jackson Blvd.
Chicago, Ill.

Fireman Fund Insurance Co.
San Francisco, California.
Gentlemen:

Enclosed herewith please find Sworn Statement in Proof of Loss covering the yacht "Wanderer".

Since we have not been furnished as requested a company form proof of loss you will please consider this formal proof of loss.

(Paragraph quoted, and stricken out, on objection at the trial at R. 122 omitted here)

Will you please let us have your prompt reply.

Yours very truly,

/s/ L. G. Wilburn

L. G. Wilburn, President
Wilburn Boat Company, a
corporation, and as Part-
ner of Wilburn Brothers,
d/b/a Wilburn Boat Com-
pany.

[EXHIBIT 50]

February 9, 1949

Fireman's Fund Insurance Company
175 West Jackson Boulevard
Chicago 4, Illinois

Attention: Mr. Arthur P. Winnebeck

Gentlemen:

Wilburn Brothers

Policy No. YA-28579

In response to your letter of January 18, we are pleased to enclose an up-to-date application and survey report covering the yacht insured under the above policy.

We hope that you will find the information contained in these papers in order but if there is any question, please let us know.

Very truly yours,

E. H. Rossow.

ef

[Tr. 47] In connection with letter dated February 9th, 1949, I hand you a photostat of the application and survey received from the R. L. McKinney Agency.

Which said document is attached hereto, and is in the words and figures following, to-wit:

(Not printed—See original and printing at R. 190-194)

[Tr. 48] Cross-Interrogatory No. 3. If you have not already done so in response to the previous questions, please attach copies of all correspondence and communications with either R. L. McKinney Agency of Denison, Texas, or Fireman's Insurance Company relating to Policy No. YA-28579? A. To the best of my knowledge and belief and

after a thorough search of our records, the correspondence included in my previous testimony and the correspondence attached to these questions is our complete file on the subject matter.

[Tr. 49] I, Arno N. Bufe of the City of Moline, County of Rock Island and State of Illinois, a Notary Public duly authorized by law to take the deposition of E. H. Rossow, do hereby certify that the said witness, E. H. Rossow, was first duly sworn by me to testify the truth, the whole truth and nothing but the truth in relation to the matters in controversy in the above entitled cause, so far as he should be interrogated concerning the same; and he thereupon testified as above set forth to written interrogatories propounded to him by me, Arno N. Bufe, Notary Public, his testimony being taken by me in shorthand at the time and place specified, and afterwards transcribed by me.

I further certify that I am not counsel, relative or attorney of either party or otherwise interested in the result of this suit.

In testimony whereof I have hereunto set my hand and attached my notarial seal this 24th day of December, A.D. 1949.

Arno N. Bufe,
Notary Public

(Seal)

Office - Supreme Court, U. S.
FILED
SEP 23 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 7

WILBURN BOAT COMPANY, *et al.*, *Petitioners,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Respondent.*

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF
IN SUPPORT OF PETITIONERS**

STEPHEN V. CAREY

SAMUEL B. BASSETT

JOHN GEISNESS

Attorneys at Law

811 New World Life Building,

Seattle 4, Washington

Applicants

BASSETT, GEISNESS & VANCE,
811 New World Life Building
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Supreme Court of the United States

OCTOBER TERM, 1954

WILBURN BOAT COMPANY, *et al.*,

Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

No. 7

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

The undersigned members of this Bar request leave to file a brief in petitioner's support.

Petitioners consent. Respondent neither unequivocally gives nor refuses consent. (See Appendix.)

Our direct interest arises thus: We represent a seaman who sustained serious injuries aboard a vessel operated between Seattle and ports in Southeastern Alaska by a Delaware corporation. An action against that operator in the United States District Court for the District of Delaware resulted in judgment for the seaman for \$25,000.00. Suit on that judgment was brought in a local Superior Court against an insurance company which had written a policy of marine liability insurance issued in California. The California Insurance Code contains a provision which is substantially comparable to the provisions of the Texas Code.

The local trial court held that the California Code provisions became incorporated in the policy of insurance and controlled its interpretation but that trial

court also held that the Delaware judgment was not entitled to full faith and credit in Washington. The result was judgment for the marine insurer. On appeal the Supreme Court of Washington agreed as to the application of the California statute but gave full faith and credit to the Delaware judgment, resulting in a Washington judgment in favor of the seaman which, together with interest and taxable costs, now amounts to some \$32,000.00.

Our Supreme Court decision was filed on August 24, 1954, notice of it being received by us on the following day. Under the circumstances literal compliance with the Amended Rule 42 was impossible.

Our proposed brief will undertake to establish that:

1) Nothing in the Federal Constitution precludes Congress from regulating marine insurance.

2) Nothing precludes Congress from permitting the several states to regulate marine insurance in absence of exclusive regulation by Congress.

3) The McCarran Act of 1945, sustained as constitutional in *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, expressly approves state regulation of all insurance, including marine.

4) To sustain the Fifth Circuit Court of Appeals will require that this court read into the McCarran Act of 1945 an excluding proviso reading, in substance, *that nothing in this Act shall authorize any state to regulate or tax marine insurance.*

The judgment in favor of our client is directly in peril. Petitioners' brief no doubt covers the question,

but, nevertheless, we believe that to a degree it may obscure the vital constitutional question by the discussion of details relative to the Texas statute. Moreover, several decisions not cited may have a controlling influence. We refer particularly to the decision of Chief Justice Hughes in *Detroit Trust Company, Trustee v. Steamer Thomas Barlum*, October Term 1934, 293 U.S. 21, 79 L. Edition 176, sustaining the Preferred Ship Mortgage Act of 1920, a radical departure from pre-existing maritime law. There are several other decisions which it would be improper to discuss at length now.

The Supreme Court of Washington in its decision filed August 24, 1954, rested its conclusion specifically on the opinion of Mr. Justice Black in *Maryland Casualty Company v. Cushing*, 347 U.S. 409, 98 L. Edition 519, and refused to accept the decision of the Fifth Circuit Court in this *Wiburn* case.

That decision, though filed on August 24, 1954, is not yet final, the time for a petition for rehearing not having expired and such a petition we are advised will be filed.

We appreciate that rules are made to be observed, but under the unusual circumstances of this case it is obvious that a literal compliance with the Amended Rule 42 was not possible.

If the Supreme Court of Washington had sustained the lower court in holding that the Delaware judgment, by reason of jurisdictional imperfections, was not entitled to full faith and credit then the validity or in-

validity of the California statute would have become a moot question in our case.

If this motion is granted our brief will be filed promptly and will not exceed twenty pages.

Respectfully submitted,

STEPHEN V. CAREY
SAMUEL B. BASSETT
JOHN GEISNESS
Applicants

CERTIFICATE

I DO HEREBY CERTIFY that the foregoing motion was served on petitioner's attorney, Theodore G. Schermeyer, at his office, San Jacinto Building, Houston 2, Texas, by mail and I do further certify that said motion was served by mail on Edward B. Hayes, respondent's attorney, at his office, 123 South La Salle Street, Chicago 3, Illinois. In each instance said service was made by depositing a copy of said motion in the United States Post Office at Seattle, Washington, on the 21st day of September, 1954, with airmail postage prepaid.

STEPHEN V. CAREY

APPENDIX

Seattle, Washington, September 14, 1954

EDWARD B. HAYES
Attorney at Law
The Field Building
123 South LaSalle
Chicago 3, Illinois

Re Wilburn Boat vs Fireman's Fund U. S. Supreme Court we wish file Amicus Curiae brief having direct interest resulting from decision Supreme Court, Washington, Williams vs. Steamship Mutual copy to you air

mail. Please wire your consent if consistent with interests your client otherwise please wire refusal so that we may make formal application in compliance with rule. Prompt response greatly appreciated.

BASSETT, GEISNESS & VANCE

Chicago, Illinois, Sept. 15, 1954

BASSETT, GEISNESS & VANCE
New World Life Building
Seattle, Washington

Reurtel of yesterday afternoon. Please refer to Rule 42 U. S. Supreme Court effective July 1st last. Petitioner's brief on the merits was filed August 25th last when the time therefor expired. Apparently the court will not receive a new brief on that side now from a stranger to the cause. The case is set for argument in a few weeks which may illustrate the occasion for the rule forbidding an Amicus Curiae brief after time has expired for the brief of the party sought to be supported thereby. In any event since my consent would be ineffective under the Supreme Court's rule I should appreciate it if you would withdraw your request for it.

EDWARD B. HAYES

Seattle, Washington, September 15, 1954

EDWARD B. HAYES
Attorney at Law
123 South LaSalle
Chicago, Illinois

Familiar with rule. We interpret your telegram fifteenth as refusing our request of fourteenth. If incorrect please advise.

BASSETT, GEISNESS & VANCE

Office - Supreme Court, U. S.

FILED

SEP 27 1954

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1954
No. 7

WILBURN BOAT Co., *et al.*,

Petitioners,

VERSUS

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

**BRIEF AMICUS CURIAE FILED ON BEHALF OF
THE AMERICAN INSTITUTE OF MARINE
UNDERWRITERS**

LEONARD J. MATTESON,
EZRA G. BENEDICT FOX,
Attorneys for Amicus Curiae,
The American Institute of
Marine Underwriters,
99 John Street,
New York 38, N. Y.

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<i>Watts v. Camors</i> , 115 U. S. 353	25, 26
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OTHER AUTHORITIES CITED:

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British Marine Insurance Act, 1906	3n
California Civil Code, Section 1624	26
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Martin's "History of Lloyds and Marine Insurance", page 46	10n
McCarran Act (15 U. S. Code, Sections 1011-1015), Public Law 15, approved March 19, 1945, 2n, 9, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 42 Section 1	32
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"Report on Marine Insurance in the United States" by Professor S. S. Huebner	2n
"Richards on Insurance" (5th ed.): Appendix P	11n
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Vernon's Texas Insurance Code, Article 5.53	11n
"Winter on Marine Insurance" (2nd Ed.):	
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1954
No. 7

WILBURN BOAT CO., *et al.*,
Petitioners,
versus
FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

**BRIEF AMICUS CURIAE FILED ON BEHALF OF
THE AMERICAN INSTITUTE OF MARINE
UNDERWRITERS**

**Introduction and Statement of Basic Question
of Law Involved**

The American Institute of Marine Underwriters is a non-profit, voluntary trade association of 139 marine insurance companies, duly admitted to transact such business in various States of the United States. The member companies are actively engaged in competing with one another and with marine insurers in foreign markets in affording marine coverage in all its varied aspects and most of them operate on a nation-wide scale. The Institute's basic purpose is to foster conditions conducive to a sound and adequate American marine insurance market, which various Congresses have declared to be necessary to "the development and maintenance of an adequate and well balanced American merchant marine,"¹ vital to this country's "na-

¹ Merchant Marine Act of June 29, 1936 (49 Stat. 1985) and Amendments thereto; Act of June 29, 1940 (54 Stat. 689); Act of April 11, 1942 (56 Stat. 214).

tional defense and for the proper growth of its foreign and domestic commerce.”²

The members of the Institute, therefore, have a definite interest in the decision of the basic question of constitutional law here presented, which is fundamental to the writing of marine insurance. That question may be summarized as follows:

Can State statutes validly displace or modify well-settled principles of the uniform general maritime law (as recognized and adopted in this country) applicable in determining the substantive rights and liabilities of the parties created by maritime contracts consisting of policies of marine insurance?

This is a question quite apart from the right of the States to regulate and tax the business of insurance generally, with which it is confused in petitioners’ brief in that they fail to differentiate between the regulation and taxation of the business activities of marine insurance companies and the substantive law relating to and determinative of contractual rights and liabilities created by maritime contracts. The member companies of the Institute make no claim that merely because they write marine insurance policies they are exempt from such regulation and taxation.³

² Merchant Marine Act of June 5, 1920 (41 Stat. 988); and see “Report on Status of Marine Insurance in the United States” by Professor S. S. Huebner, approved by the House Merchant Marine and Fisheries Committee, 66th Congress, Feb. 26th, 1920, page 9.

³ The companies writing marine insurance as a part of their general business have always been subject to regulation and taxation in respect to their business in general, and still are by virtue of the McCarran Act which protects such regulation and taxation from attack under the commerce clause of the

The effect of a decision on this broad question cannot be restricted to the particular set of facts in this specific case, but will obviously have application to every policy of marine insurance now or hereafter issued in the United States, including policies of all types of marine coverage on all manner of vessels, small or large, inland or sea-going, as well as on cargoes moving by water in inland, coastal, inter-coastal and international trade. The fact that the particular vessel here involved was small and located at the time of her loss on an inland lake, cannot obscure the importance and scope of the basic question presented.

The decisions of the Courts below stand squarely on the proposition that the policy was of marine insurance and, as such, was a maritime contract, which requires that the respondent's liability be measured by the standards of the maritime law, according to which contracts of insurance must be enforced as written and all warranties therein complied with literally (R. 201-2). "There is and can be no doubt," the Court of Appeals said, "that this suit which challenges the validity and effect of the terms of a maritime contract does involve a characteristic feature of substantive admiralty law" (R. 205) which

Constitution, despite the holding in *United States v. South-Eastern Underwriters*, 322 U. S. 533, that insurance is commerce. The assertion (Pet. Brf., p. 13) that insurance is not commerce is based on earlier cases, as were also the inconclusive statements with respect to federal regulation cited from the Congressional Record and from statements at Senate hearings on the District of Columbia Model Marine Insurance Act cited (Pet. Brf., p. 15, n. 9, and pp. 24-25). Congress could always have regulated marine insurance under the grant of judicial power over maritime matters, Const., Art. III, Sec. 2, and could certainly have passed such an act as the British Marine Insurance Act, 1906 (Pet. Brf., p. 23), which is merely declaratory of substantive rights under marine insurance policies. Its failure to do so leaves those rights subject to the general maritime law as judicially interpreted.

State law is not admissible to modify (R. 204). Aside from the fact that "it is the settled doctrine that a marine contract of insurance is 'derived from', is 'governed by', and is a 'part of' the general maritime law of the world" (R. 204), the Court found that the policy provisions "covered the operation of the vessel on navigable waters of the United States without as well as within the State of Texas" and that the waters of Lake Texoma are part of the navigable waters of the United States (R. 201-2), facts which are not challenged by the petitioners. Actually the policy also covered the vessel on her voyage from Greenville, Miss. via the Mississippi and Red Rivers to Lake Texoma on navigable waters of the United States passing through several states (R. 169). Consequently, there can be no distinction drawn in this case between the policy before the Court and any other policy of marine insurance.

Petitioners' counsel makes a serious error in stating that "the insurance on the 'Wanderer' comes within the inland marine classification" (Pet. Brf., Note 31, p. 26). Inland marine insurance is a technical classification of risks, not marine at all, to which the principles of marine insurance do not apply. See *Davis Yarn Co. v. Brooklyn Yarn Dye Co.*, 293 N. Y. 236, 247-8, opinion by Conway, J., formerly Insurance Commissioner of the State of New York; also *Stecker v. American Home Fire Assur. Co.*, 299 N. Y. 1, 6. Art. 5.53 of the Texas Insurance Code specifically provides that the term "inland marine insurance" shall not "be deemed to include insurance of vessels or craft * * * or any other risk commonly insured under marine as distinguished from inland marine insurance policies".

It is, therefore, clear that a typical policy of marine insurance is here involved and that all marine insur-

ance contracts will be affected by the decision of this Court.

Under the present status of the law relating to marine insurance policies, marine coverage of all types is now readily available in the American market at reasonable rates in competition with the London and other foreign markets. Such competition is only possible because of the uniformity in effect given to policy terms and conditions under the general maritime law which is in substance the same in England as it is in this country. This Court has recognized the existence of special reasons for keeping the law of this country "in harmony with the marine insurance laws of England, the great field of this business". *Queen Insurance Co. v. Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493. If marine underwriters in this country are to be subjected to increased and uncertain policy liabilities by the varying laws of the 48 states, necessarily leading to increased premiums, such competition on equal terms will no longer be possible and the American marine insurance market will be seriously weakened.

The fundamental issue here posed does not concern marine underwriters alone, but is of equal, if not greater, importance to the national economy as a whole, affecting all ship and cargo owners and through them the commerce of the nation. The intimate relationship and direct effect of the cost of marine insurance on commerce was recognized by this Court in *Thames & Mersey Marine Ins. Co. v. United States*, 237 U. S. 19, where a Federal wartime stamp tax on marine insurance policies covering goods exported was held unconstitutional as imposing (p. 27) "as much a burden on exporting as if it were laid on the

charter parties, the bills of lading, or the goods themselves.”

Not only will the expense of marine insurance in this country be increased,⁴ since it is axiomatic that premiums must be adequate to cover increased and uncertain liabilities if insurance companies are to stay in business, but, as we shall show in Point I hereof, the readiness with which such insurance is presently available will be restricted.

The decisions of the Courts below are in accordance with well-settled authority. As long ago as 1815 Justice Story held in *De Lovio v. Boit*, F. C. 3776, that a policy of marine insurance is a maritime contract and a subject of the admiralty jurisdiction and the judicial power of the United States under the Constitutional grant of power in “all cases of admiralty and maritime jurisdiction” (Art. III, Sec. 2). In *Insurance Co. v. Dunham*, 78 U. S. 1 at page 35, this Court said that the learned and exhaustive opinion of Justice Story in that case “has never been answered”, and adopted his views.

In *Aetna Ins. Co. v. Houston Oil & Transport Co.*, 49 F. (2d) 121 (5th Cir.), the Court held (p. 124) that a policy of marine insurance covering a vessel on navigable waters of the United States was “a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas” and, accordingly, that Section 4931 of the Texas Revised Civil Statutes (now Texas Insurance Code, Art. 6.15) could not operate, in favor of the mortgagee

⁴ Petitioners seem to acknowledge at p. 11 of their brief that if their contentions as to the applicability and effect of the Texas Statutes upon the marine policy here involved were to be sustained, higher premiums for Texan assureds would necessarily result.

of the vessel, to obviate the effect under the general maritime law of a breach by the insured owner of a watchman warranty in a hull policy. This Court denied certiorari in that case—284 U. S. 628. A most recent re-affirmation of the legal principle that, by reason of the delegation of judicial power over cases of admiralty and maritime jurisdiction to the Federal Government under Art. III, Sec. 2, of the Constitution, the rights of the parties to a marine insurance contract are controlled by the Federal general maritime law and not that of the States is to be found in *Compania Maritima Astra, S. A. v. Archdale* (an action on a hull policy to recover for a constructive total loss by stranding), N. Y. Law Journal, June 28, 1954, p. 5 (not yet officially reported).

We shall discuss more fully under Point II hereof the long established principles of law and the decisions of this Court which fully support those propositions.

There can be no doubt that under established principles petitioners could have sued on this policy of marine insurance in admiralty. The Court of Appeals properly held that their rights must be measured by the standard of the maritime law even though the proceeding was instituted in a common law court (R. 202), *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 384, and that, when so asserted, their substance is unchanged (R. 204).

The Court of Appeals correctly stated that the settled doctrine of the general maritime law that contracts of marine insurance will be enforced as written and that a warranty contained therein must be complied with literally (R. 202). See cases cited by the Court (R. 202, 3). We shall show under Point I that the writing of marine insurance, by virtue of the

nature of the subject matter, the relationship of the parties, and the basis on which premiums are fixed, is peculiarly dependent upon this doctrine and its uniform enforcement. If petitioners' contentions as to the application and effect of the Texas Statutes upon this policy are accepted, there will be a clear interference of the State Statutes with this settled doctrine of the general maritime law—a "hostile conflict" (R. 204).⁵

The Court of Appeals correctly disposed of petitioners' argument that the McCarran Act authorized State legislatures to control and modify the substantive rights of the parties under a maritime contract consisting of a marine insurance policy. It pointed out that that Act was passed only to meet the decision in *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, holding that insurance is commerce and within the regulatory power of Congress under the commerce clause of the Constitution, and that the Act declares only that the business of insurance might still be subject to state regulation and taxation free from attack under the commerce clause. The Court further pointed out that admiralty and maritime law does not depend for its effect upon the power of Congress to regulate commerce (R. 205). It depends rather on the constitutional grant of judicial power to the United States over cases of admiralty and maritime jurisdiction which has been held to establish the general maritime law as federal law, uniform in its application and effect, and beyond the power of the States

⁵ The Court of Appeals was obviously impressed with the "persuasive" and "vigorous" argument of respondent's counsel that "The Texas Statutes as construed by the Texas Courts have no application to the present situation" (R. 205), but chose to base its decision on the dominance of the maritime law in the determination of substantive rights under a maritime contract, whatever the State law might be.

to modify in its substantive and characteristic features. We shall discuss the McCarran Act under Point III and there demonstrate that it does not have the effect claimed by petitioners.

We shall further show under Point IV that respondent's right to have its liabilities under this maritime contract determined according to the general maritime law is a constitutional right of which it may not be deprived by the statute of any State.

POINT I

Marine insurance, because of the nature of its subject matter and the relationship of the parties, is dependent for rational and ready underwriting on the principles of the general maritime law developed by long years of experience safeguarding such underwriting and uniformly applied and, in particular, on the principle that contracts of marine insurance must be enforced as written.

The writing of marine insurance is peculiarly dependent upon the applicability and uniform enforcement of the principles of the general maritime law developed over centuries of experience, and is particularly dependent upon that principle of the general maritime law which formed the basis for the Court of Appeals decision that such "contracts of insurance must be enforced as written" (R. 202) which includes the proposition that "a warranty in a contract of insurance must be literally complied with" (R. 202-3).

Marine insurance is of ancient origin. Although England has grown to be the great field of marine

insurance underwriting, the insurance of vessels and cargoes against marine risks originated on the Continent,⁶ probably in Italy in the 12th century. As Mr. Justice Bradley pointed out in *Insurance Co. v. Dunham*, 11 Wall. (78 U. S.) 1, at p. 31, the contract of marine insurance "sprang from the law maritime, and derives all its material rules and incidents therefrom".

The rules for the construction of maritime contracts of marine insurance of necessity differ materially from the law relating to other types of insurance. However, as pointed out by the learned author of Philipps on Insurance in Section 635, in many respects "the difference is not * * * so much one of doctrine as of the subject matter, and of the degree of confidence necessarily placed in the assured by the underwriter". These two factors, together with the known effect of long settled principles of the uniform maritime law presently governing the respective rights and liabilities existing between a marine insurer and his assured, are determinative of the premium rate charged in respect of whatever risks marine underwriters are asked to assume in each particular case. It is, in fact, the very existence, and uniform enforceability, of policy terms and conditions, including warranties designed to limit and define the risks, physical and moral, which are under-

⁶ In *Croudson v. Leonard*, 4 Cranch (8 U. S.) 434 (a marine insurance case), it was noted at p. 435 that "policies of insurance are known to have been brought into England from a country that acknowledged the civil law". The earliest (1613) extant English policy almost exactly resembles the form given in "Le Guidon de la Mer", published in France in 1600, and for the most part is in accord with the Lloyd's form now in use. Martin's "History of Lloyds and Marine Insurance", p. 46.

taken, that make the ready writing of marine insurance practicable.

Marine insurance is unique in its subject matter, in the causes and risks of loss to which the subject matter is exposed, and in the relationship of the parties. The subjects of marine insurance, and the interests therein to be insured, are so different, the risks and causes of loss so varied, and the types and conditions of insurance available so manifold, that the writing of marine insurance is unique. Unlike fire and other types of insurance, no State or regulatory body has attempted to establish uniform policy conditions or rates in respect of marine insurance.⁷ Each contract of marine insurance is a matter of individual negotiation. The type, conditions and limits of the insurance written varies with the nature of the property insured, each requiring peculiar limitations and safeguards. The conditions of the insurance written depend upon the peculiar requirements of the individ-

⁷ In the marine field, rates are set by the individual underwriter, not by Rating Bureaus. The State legislatures have recognized the complexities inherent in the problem and the need for freedom of contract by refraining from requiring the filing of marine rate schedules with, and for approval by, State Insurance Commissioners as is prescribed in virtually every other field. See "*Richards on Insurance*" (5th ed), Secs. 22, 52. This is true of Texas (see Art. 5.53 of Vernon's Texas Insurance Code), as well as of the District of Columbia Model Marine Insurance Code. Moreover, the model "Fire, Marine and Inland Marine Rate Regulatory Bill" (Appendix P of "*Richards on Insurance*" (5th ed.), approved by the National Association of Insurance Commissioners on June 12, 1946, and subsequently adopted by nearly every State (Richards, Sec. 52), in Sec. 2(a) thereof specifically excepts from its rate requirements "insurance of vessels or craft, their cargoes * * * or other risks commonly insured under marine, as distinguished from inland marine, insurance policies." Please note the respective definitions of "marine insurance" and of "inland marine insurance" set forth in Art. 5.53 of the Texas Insurance Code.

nal assured and are frequently determined by the consideration of what he is willing to pay for.

The vessels involved may be yachts, excursion boats, river steamers, coastwise vessels, tramps, liners, fleets, dredges, fishing vessels, barges, tankers, cargo, passenger or other vessels, employed in limited inland waters, or extensively across the seas, in various trades or employments or uses. Special considerations and necessary limitations are applicable to each type.

The cargoes may be small or large, individual shipments or full ship loads, manufactured or raw materials, grain, ores, chemicals, etc., in bulk or packaged. They may be dangerous in themselves or when stowed with other cargoes. Some may require special packaging or treatment before or during shipment. The conditions and limitations of insurance thereon and the premiums charged are directly related to such factors.

The insurance may be hull, cargo, freight, disbursements, increased value, voyage policies, time policies, open policies, total loss only, with average, or free of particular average, with or without war risks, with or without liability insurance, and may include a collision (liability) clause, or towers liability clause, or other special clauses.

The varied and peculiar risks or causes of loss to which vessels, cargoes, and other interests insured may be subject are partially represented by the various perils enumerated in the perils clause of the instant policy among which fire is normally included (R. 173, 2nd Par.).

In addition to risks of physical loss, the interests covered by marine policies may be subject to special liability and loss arising out of the peculiar principles of the maritime law, such as for salvage, general average, bottomry, respondentia, etc..

Of necessity, every policy of marine insurance is tailor-made to meet the requirements, desires or capacity of the individual assured. It is usually written on a basic form using traditional and well understood language, but such insurance is added to, or limited by, riders or endorsements affixed to the policy, many of which are more or less standard, but many of which are also specially drawn or adapted to fit the individual case.

In order to define and limit the nature and quality of the risks undertaken so that premiums can be rationally fixed, conditions and warranties are included in, or attached to, the policy form. Most of the customary hull and cargo policy forms, including policy forms or clauses suggested by the American Institute of Marine Underwriters and by the Institute of London Underwriters, contain specific and standardized warranties. Without such warranties and conditions, and the assurance that their integrity will be respected and preserved, premiums cannot be intelligently fixed and the writing of marine insurance would become a gamble rather than a business.

Examples of warranties frequently used to limit risks are those confining the operations of vessels to specific waters, or trades, or uses. The warranty that the yacht "Wanderer" would be "used solely for private pleasure purposes" (R. 173) was such a warranty commonly used in yacht policies, intended to

confine the vessel to the normal uses of a yacht owner on the theory that the risks, both physical and moral, would be increased if the vessel were used, or privileged to be used, for commercial ventures. Whether this warranty is as important as the warranty limiting the waters in which she might be used (R. 169) is beside the point. Both are basic in determining the risk undertaken by the underwriter and the premium charged. If the effect of one is nullified unless the underwriter can show that the breach contributed to the destruction of the property, so is any other, and all fixed limits of insurance are thereby voided.

In Petitioners' Brief, page 21, the statement is made that "we are not dealing here with the construction of * * * a marine watchman clause * * *" such as was dealt with by the Court in *Aetna Insurance Co. v. Houston Oil & Transport Co.* (C. A. 5), 49 F. (2d) 121, cert. den. 284 U. S. 628, the inference perhaps being that such a clause may continue to be dealt with under the general maritime law although the effect of the "use" warranty may be avoided in the present case. There is, however, no suggestion by the petitioners as to why this principle should be applicable to one warranty but not the other and we submit there is none. If Article 6.14 is competent to modify the effect of one warranty in a marine insurance policy, it is equally competent to modify any other, express or implied.

The relationship of the parties in marine insurance is also unique. Due to the transient nature of the property insured, the extraordinary perils to which it may be subject in operation or movement, the fact that the circumstances of its operation or movement

cannot be as adequately known or overseen as in the case of fixed property, the underwriter is peculiarly at the mercy of the integrity and good faith of the assured. As a result, there have been developed in the general maritime law for the protection of the underwriter as a result of long experience certain principles and implied warranties peculiar to marine insurance. The principle of *uberissima fides* applies, requiring disclosure by the assured to the underwriter, although no inquiry be made, of every fact material to the risk within the former's knowledge. *Stecker v. American Home Fire Assur. Co.*, 299 N. Y. 1, 6. See also *Clarkson v. Western Assur. Co.*, 33 App. Div. (N. Y.), 23, 28-30; and the discussion of the moral hazards in marine underwriting set forth at pp. 95, 242-3 of "*Winter on Marine Insurance*" (2nd Ed.).

Examples of warranties implied by the general maritime law as adopted in this country in marine insurance contracts are the warranty of seaworthiness at the attachment of the risk or the beginning of the voyage, warranty of no deviation, warranty of no change of voyage, warranty of legality, warranty of neutrality, warranty against delay in sailing, warranty against unreasonable delay on the voyage, etc.. All of these implied warranties limiting the risks undertaken by the insurer may be rendered of substantially no effect if Art. 6.14 Texas Insurance Code is held validly applicable to policies of marine insurance.

It is only because of the existence of such principles of the general maritime law and the assurance that conditions and warranties written into the policy will be respected and enforced that insurance in this complicated field can be written with the readiness and

facility required by vessel owners and those engaged in commerce. Because of the existence of these safeguards, marine insurance can be obtained readily from underwriters, as it was in this case, in spite of sketchy knowledge available to them concerning the parties or the property to be insured.

Destruction or modification of these principles by varying state laws will destroy the facility with which the marine insurance business is carried on,—to the inconvenience and expense of vessel and property owners requiring such insurance. Marine underwriters, faced with such conditions, must hesitate and investigate before granting insurance, and they must charge higher premiums for uncertain or increased liabilities, since it is axiomatic that premiums must cover liabilities, expenses, and some profit, if insurance companies are to remain in business.

Aggravation of such conditions will especially ensue if force and effect is given to such State enactments as Art. 21.42 of the Texas Insurance Code (Pet. Brf., p. 4) purporting to subject to Texas laws any contract of insurance “payable to a citizen or inhabitant of the state”, regardless of where the policy was written or issued or where the assured then resided. Owners of vessels or cargo may change their residence after the policy is issued and, in the case of corporations, some may be considered as an “inhabitant” of more than one state. An underwriter may therefore be unable to know in advance the State whose laws will determine his liability under his policy.

The application of State statutes such as Art. 21.42 would have particularly serious repercussions in respect of open cargo policies. Such open policies cover

all shipments made during a specified period of time by the party to whom the open policy is issued and grant to such party authority to issue and countersign on behalf of the insurer certificates of insurance to cover each individual shipment made by him during the life of the policy for account of whom it may concern. Such certificates take the place of a policy in respect of the cargo described therein and afford the basis for an action by the holder for value. As was pointed out in *Thames & Mersey Ins. Co. v. U. S.*, 237 U. S. 19, 23, and 26, these certificates of insurance become one of the required shipping documents in any C. I. F. sale of the goods. They thus change hands frequently during transit of the shipment and the period of coverage. In other words, a marine insurer who issues an open cargo policy has no means of knowing at the time of its issuance who the ultimate assureds, as holders for value of the various insurance certificates to be issued thereunder, will be, nor in what State they will turn out to reside.

In short, if State statutes should be held to displace settled rules of the general maritime law in respect of contracts of marine insurance, the foregoing demonstrates the utter impossibility of a marine insurer being able to estimate the nature and extent of his liability in case of loss. A proper estimate thereof is, however, necessary in order to permit the underwriter to set a proper premium. As the Court said in *Williams v. Ins. Co.*, 245 App. Div. 585 (N. Y.), at p. 586: "The premium * * * was fixed by their contract with the insurer; its amount depended upon the risk to be assumed by the insurer." See also, *inter alia*, *Md. Ins. Co. v. LeRoy*, 7 Cranch (11 U. S.) 26, at p. 30, and "*Winter on Marine Insurance*", 2nd Ed., p. 99 and p. 174.

The existence of the various factors above outlined which are peculiar to marine insurance, and the direct and intimate relationship of marine policies to our foreign as well as to our domestic commerce, have led this and other Courts to stress from the earliest days the importance and need "in the uniformity of the application of rules to it", to use Mr. Justice Story's words in *Peters v. Warren Ins. Co.*, 14 Pet. (39 U. S.) 99, at p. 109, an action on a hull policy. Or as Mr. Justice Peters said in *Thurston v. Koch*, 4 Dall. (4 U. S.) 348 (a case involving double insurance of goods on the brigantine "Nancy"), at p. 352:

"To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform and generally received law-merchant. The custom or practice of one state, differing, perhaps, from that of another, must yield to general and established principles."

This necessity for uniformity was also the basis of the recognition by this Court in *Queen Ins. Co. v. Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493, that the law of this country relating to marine insurance should be kept in harmony with that of England, the great field of this business. Petitioners' contentions, if sustained, would not only result in complete abandonment of that objective, but would destroy uniformity of the prevailing maritime law in this country by making the construction of the contractual relationships under policies of marine insurance subject to the varying statutory law of forty-eight States.

Numerous cases have also stressed the dangers inherent in changing a settled construction of standard provisions in marine insurance policies. See, *inter*

alia, *Hale v. Washington Ins. Co.*, 11 Fed. Cases 189, 192; *Dickey v. Baltimore Ins. Co.*, 7 Cranch (11 U. S.) 327, 331; *Olivera v. Union Ins. Co.*, 3 Wheat. (16 U. S.) 183, 190; *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, at p. 493; *Lehigh etc. Coal Co. v. G. & R. Fire Ins. Co.*, 6 F. (2d) 736 (2 Cir.), 738-9.

Marine insurance is for all these reasons dependent for rational and ready underwriting upon the uniform application and uniform enforcement of established principles of the general maritime law giving to the provisions of the contract their full effect and traditional meaning. The contracts are individually negotiated and are always subject to limitations express and implied. There is full freedom of contract on both sides. There is, therefore, no injustice in requiring the assured to live up to his part of the bargain and in enforcing the limiting conditions which form the bases on which the insurance is written and the premium fixed.

POINT II

The grant in Art. III of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction makes invalid any State statute in so far as the same operates to displace or substantially modify the settled general maritime law applicable in maritime cases to the determination of substantive rights rooted in that law. The present case involves such rights.

The overlapping nature and similarities of the subject-matter affected by Art. I, Sec. 8, and by Art. III,

Sec. 2, of the Constitution have at times tended to obscure the fundamental difference between those two separate and wholly distinct grants. The former merely gave Congress power to enact such laws as it might deem necessary "to regulate commerce with foreign Nations and among the several States". Until Congress legislated on a national basis and to the extent that it did not fully occupy the field, State law was unaffected. Art. III, Sec. 2, on the other hand, deals with the judicial power of the United States and extends such judicial power "to all cases of admiralty and maritime jurisdiction". The *Belfast*, 7 Wall. (74 U. S.) 624, is an early example of the fact that this judicial power operates in respect of maritime contracts of a wholly intrastate nature. Thus, it may be said that Sec. 8 of Art. I provides for permissive uniformity in the field of non-maritime interstate and foreign commerce, whereas Sec. 2 of Art. III specifies a mandatory uniformity in matters involving, and directly affecting, maritime commerce generally.

An example of confused thinking in respect of those two separate grants is afforded by the fact that pilotage cases such as *Cooley v. Board of Wardens*, 12 How. (53 U. S.) 299 (Pet. Brf., p. 17), and *Ex parte McNeil*, 13 Wall. (80 U. S.) 236, are sometimes cited in connection with questions of maritime law embraced by Art. III, Sec. 2, whereas the regulation of pilotage is not the exercise of Federal maritime judicial power, but falls solely under Art. I, Sec. 8, as is shown in *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195. Similarly, the facts and points of law involved in *Hooper v. California*, 155 U. S. 648, cited so many times in petitioners' brief, and its companion case (*Nutting v. Massachusetts*, 183 U. S. 553), clearly

show that they relate solely to commerce, *i. e.*, to Art. I, Sec. 8, rather than to the general maritime law, yet they too have sometimes been confused with, (as the petitioners do herein) and referred to as involving, constitutional issues raised by Art. III, Sec. 2. We shall discuss those two cases in greater detail at pp. 35-36, *infra*. See also *Allgeyer v. Louisiana*, 165 U. S. 578.

The distinction between the nature and scope of these two Constitutional grants has also tended to become obscured in certain classes of cases by the fact that Congress, in implementing the grant of exclusive Federal judicial power over all maritime causes of action by its enactment of a Federal Judicial Code, provided for concurrent jurisdiction of common-law courts over those types of maritime cases where the common law practice affords a competent remedy for the enforcement of the rights created by the general maritime law. The existence of this limited concurrent jurisdiction has frequently resulted in confusion of analysis, despite the fact that Congress carefully specified that only "the right of a common-law remedy" was saved to suitors in maritime matters. However, this Court has consistently recognized this restriction in the "saving clause". An early example is *The Moses Taylor*, 4 Wall. (71 U. S.) 411, which involved a maritime contract for transportation by sea.

Many other decisions by this Court have also been based on the recognition of that restriction and have held that the "saving clause" does not permit substantial modification of settled substantive maritime law by State statutes or, as stated in *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, at p. 384, "give the complaining party an election to determine

whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law". The saving clause does not permit "attempted changes by the States in the substantive admiralty law". *Red Cross Line v. Atlantic Fruit Co.*, 254 U. S. 109, 123-4. See also *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245; *Madruga v. Superior Court*, 346 U. S. 556, 561.

Since policies of marine insurance constitute contracts between a marine insurer and his assured, the remedy available at common law for the enforcement of contractual rights is particularly "competent" in respect of actions on such policies. Nevertheless, the State courts, as well as this Court, have invariably recognized the application thereto of a "marine rule" as distinguished from "ordinary rules" applicable to other types of insurance contracts. See, for example, *Stecker v. American Home Fire Assur. Co.*, 299 N. Y. 1, at pp. 6-7; *Blair v. Nat. Security Ins. Co.*, 126 F. (2d) 955, at p. 957 (3rd Cir.); and the cases therein respectively collected.

Moreover, the incontrovertible facts of history concerning the origin of marine insurance and the development of the law relating thereto establish that, as was said by the learned authors of "Benedict on Admiralty", "it is, indeed, of all contracts, the most purely maritime" (Sec. 213, 4th edition). In his scholarly opinion in *DeLovio v. Boit*, (1815) Fed. Cases No. 3776, Mr. Justice Story, after a review of the historical antecedents, pointed out that "all civilians and jurists agree" that policies of marine insurance "are properly to be deemed 'maritime contracts'" (p. 444). While it is true that it was not until 1870 (*Ins. Co. v. Dunham*, 11 Wall. (78 U. S.) 1)

that this Court ruled on the question whether the constitutional grant to the United States of jurisdiction over admiralty and maritime matters extended to cases involving marine insurance policies, it is to be noted that as early as 1808 Mr. Justice Johnson in *Croudson v. Leonard*, 4 Cranch (8 U. S.) 434 (an action on a hull policy), pointed out at p. 435 that marine insurance was "brought into England from a country that acknowledged the civil law" and that "this must have been the law of the policies". It is also the fact that, prior to 1870, there were various cases other than *DeLovio v. Boit*, *supra*, specifically holding that marine insurance policies are maritime contracts and thus are within American admiralty and maritime jurisdiction,⁸ and not a single recorded decision in denial of their essentially maritime nature. Likewise, we know of no decision subsequent to 1870 holding that marine insurance policies are not maritime contracts, whereas there are many cases in both State and Federal courts in which their maritime nature has been acknowledged. One of the latest is *Companhia Maritima Astra S. A. v. Archdale*, N. Y. Law Journal, June 28, 1954, p. 5 (not yet officially reported).

In *Ins. Co. v. Dunham*, *supra*, after a review and reaffirmation (pp. 24-29 of 11 Wall.) of the rulings of this Court that maritime contracts, including *in personam* actions thereon, fall within a proper interpretation of the Constitutional grant as to admiralty and maritime jurisdiction and that in this country the jurisdictional criterion in respect of contracts was not the place where they were made, but their subject-matter, Mr. Justice Bradley, addressing himself to

⁸ *Peele v. Merchants Ins. Co.*, (1822) Fed. Case No. 10,905; *Hale v. Washington Ins. Co.*, (1842) Fed. Case No. 5916; *Gloucester Ins. Co. v. Younger*, (1855) Fed. Case No. 5487.

this latter aspect, stated at page 31 that "it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom." He went on to point out (p. 32) "that the contract of marine insurance is an exotic in the common law; * * * It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians" and (p. 34) that "it is, in fact, a part of the general maritime law of the world; * * *".

Since it is clear from the foregoing that the substantive rights and liabilities existing under a contract of marine insurance rest upon the long-settled rules of maritime law, it follows that the basic question in the case at bar falls within, and is determined by, the fundamental principle upon which the majority of this Court based their decision in *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406. In that case, in overruling the contention there made "that Hawn's rights must be determined by the law of Pennsylvania" since Hawn "was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law," the majority of this Court stressed that (p. 409) "his right of recovery * * * is rooted in federal maritime law" and, on that basis, held (pp. 409-410):

"Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been fre-

quently declared and we adhere to them. See *e. g.*, *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 243-246, and cases there cited."

It follows that since it is established that a marine insurance policy is a maritime contract whose meaning and effect are derived from and controlled by the general maritime law, a State cannot, under the settled principles reiterated in the *Hawn* case, *supra*, "deprive a party of any substantial admiralty rights" thereunder, or modify the dominant substantive maritime law governing the rights and liabilities of the parties thereto.

In the *Hawn* case this Court specifically exposed (pp. 410-411) the fallacy of the contention that this Court's ruling in *Eric R. Co. v. Tompkins*, 304 U. S. 64, requires the application of State law to a maritime cause of action if the concurrent jurisdiction of a common law Court is invoked. As there pointed out, the substantive law applicable in maritime matters is "not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket" (p. 411 of 346 U. S.).

In short, the several fundamental principles reaffirmed and applied by the decision of the *Hawn* case dispose of the petitioners' major contentions in the case at bar and require an affirmance of the decisions of the lower Courts herein. Accordingly, it is not necessary to review the many earlier decisions of this Court. Because they are especially apposite, we wish, however, to direct particular attention to *Watts v. Camors*, 115 U. S. 353, and *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

The *Watts* case involved (p. 353) a "charter-party, made and concluded upon in * * * New Orleans", containing a provision for payment of the estimated amount of freight in case of a breach by the charterer. As noted by the Court, such a clause, contrary to the admiralty rule, was sanctioned by the Louisiana Civil Code and the Louisiana Courts strictly enforce such a contract term. This Court sustained the charterer's contention (p. 359) "that being a maritime contract, its construction was not affected by the local law of Louisiana". The *Watts* case was cited by this Court in *Union Fish Co. v. Erickson*, 248 U. S. 308 (1919), as one of its authorities for there overruling respondent's contention that the contract in that case was rendered invalid by Sec. 1624 of the California Civil Code, *i. e.*, by the *lex loci contractus*, and specifically holding (p. 313) that the general maritime law was controlling.

In the *Phoenix Ins. Co.* case, *supra*, an action on an ocean bill of lading issued in New York, it was held (p. 443 of 129 U. S.) that State law, even though it was the *lex loci contractus*, was not binding and that the contractual rights were to be determined solely by the general maritime law as adopted in this country. At p. 36 of the *Dunham* case (11 Wall.), Mr. Justice Bradley pointed out the close analogy existing between maritime contracts of affreightment and contracts of marine insurance.

We should also refer to two decisions of this Court in the current year; namely *Madruza v. Superior Court*, 346 U. S. 556, and *Maryland Casualty Co. v. Cushing*, 347 U. S. 409.

In the *Madruza* case, which was a State court action in a vessel's home port for its sale and for the parti-

tion of the proceeds among its owners pursuant to a California statute, the majority of this Court there ruled that neither the settled rule, of general maritime law nor any reasons requiring national uniformity in such type of case made the admiralty jurisdiction exclusive and that it was, therefore, under such circumstances competent under the "saving clause" of the Judicial Code for the State court to exercise concurrent jurisdiction *in personam* in (p. 563) "these essentially local disputes" between co-owners of a vessel. In other words, no rights and liabilities under an essentially maritime contract were there involved. It was stated, however, at page 561 that if there were "a national admiralty rule", *i. e.*, settled substantive maritime law on the subject, it "would bind the California court here, even though it has concurrent jurisdiction to grant partition".

The principles involved in that case are similar to those underlying the decision of this Court in *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1924). The essence of that decision was that, in implementing the concurrent jurisdiction of State Courts permitted by the "saving clause" in the Judicial Code, the State of New York (p. 124) "had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, * * * in a contract made in New York and which, by its terms, is to be performed there". In the very same paragraph, Mr. Justice Brandeis also ruled that "the 'right of a common law remedy', so saved to suitors, *does not* * * * include attempted changes by the States in the substantive admiralty law"; and he went on to distinguish the

principles underlying the *Jensen* line of cases by stating (p. 124):

“This state statute is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt * * * to modify the substantive maritime law * * *.”

On the contrary, in the case at bar the petitioners seek to have the settled substantive rules of the general maritime law applicable to a maritime contract consisting of a policy of marine insurance displaced or materially modified by State statutes relating to insurance in general.

In *Maryland Casualty Co. v. Cushing*, 347 U. S. 409, this Court considered only (1) whether the McCarran Act is relevant to State legislation conflicting with the federal maritime law and (2) whether the operation of the Louisiana direct action statute conflicted with the comprehensive legislative system for adjudicating maritime claims set forth in the Federal Limitation of Liability Act. The principles of maritime and constitutional law and the construction of the McCarran Act set forth in the prevailing opinion of this Court in the *Cushing* case are wholly applicable to the fundamental issue in the case at bar and conclusively dispose of the several contentions made by the petitioners herein that State statutes can materially alter the law of marine insurance long established by well-settled rules of the general maritime law as adopted in this country. In fact, those rulings apply even more pertinently and with greater force in the

case at bar where substantive rights under a maritime contract are involved as distinguished from the ultimate question in the *Cushing* case as to the availability of procedural remedies afforded third parties by a State "direct action" statute. The position taken in Mr. Justice Clark's concurring opinion seems to be based on such a distinction.

The dissent in the *Cushing* case was based on several grounds, one of which was the scope, nature and purpose of the Limited Liability Act. Obviously, those factors are not involved in the case at bar. Another ground involved the construction to be given to the McCarran Act in connection with construing (p. 437) "federal statutes such as the Limited Liability Act" in relation to (p. 437) "a state law like Louisiana's", described a few pages before as one which (p. 431) "would further the equitable aims of admiralty by providing relief not otherwise available for maritime wrongs" for the benefit of seamen, who (p. 438) "have traditionally been the wards of admiralty", and the application of which (p. 438) "under the circumstances here is also in harmony with the humane policy of the maritime law". In the case at bar, not only are these latter considerations not present, but also there is not presented any question as to any Act of Congress which does not "specifically relate(s) to the business of insurance" being "construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance" (Sec. 2(b) of the McCarran Act—15 U. S. C., Sec. 1012(b)).

As stated by Mr. Justice Black, it is (p. 436) "unquestionably true * * * the McCarran Act was passed in response to this Court's decision that insurance

was subject to the federal commerce power". Thus, the McCarran Act was enacted by Congress in exercise of the powers vested in it under the Commerce Clause, Art. I, Sec. 8, of the Constitution. The issue of constitutional law raised in the case at bar, however, has no relation to the Commerce Clause, but arises under Sec. 2 of Art. III, which grants to the United States exclusive judicial power over maritime matters. In referring to that aspect, the dissent took the view with respect to the remedy afforded by a "direct action" statute, that (p. 431) "to enforce the Louisiana law would not impair the uniformity of maritime law, but would once again 'illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court * * *'" *Workman v. New York City*, 179 U. S. 552, 563".

In the instant case, however, it is not a question of a State statute supplementing maritime rights and the powers of admiralty courts in the uniform administration of equitable justice, but an attempt to have the varying local statutes of the States supplant the settled rules of maritime law governing substantive rights under a maritime contract based on that law. In other words, the case at bar comes within the constitutional limitation upon State power imposed by the Admiralty Clause and so clearly stated by Mr. Justice Brandeis in the *Red Cross Line* case, *supra* (to which reference was made by Mr. Justice Black at p. 429), *i. e.*, it is an instance where (p. 429 of 347 U. S.) "a state attempts to modify or displace essential features of the substantive maritime law". In short, the various grounds of dissent stated in the *Cushing* case are not applicable to the basic question of law in the case at bar.

We submit, therefore, that the State statutes of Texas relied upon by the petitioner cannot modify the substantive rights of the parties to the policy of marine insurance in this case which is a maritime contract. Those rights are derived from, and solely determinable by, the general maritime law of the United States.

POINT III

The McCarran Act does not, and was not intended to have, the effect of authorizing State statutes relating to insurance to alter or supercede our general maritime law in the determination of the substantive rights of the parties to a contract of marine insurance or to validate State statutes contravening any provision of the Constitution other than the commerce clause.

As the Court of Appeals correctly held (R. 205), the McCarran Act has "no application here". Petitioners' injection of that Act into this case involves two fallacies. First, they confuse the basic question as to what law is applicable in determining substantive rights created by maritime contracts consisting of marine insurance policies with the question of the regulation of *business* activities of marine insurance companies (including marine insurers) carried on within a State. Secondly, they misconceive and misinterpret the purpose, scope and effect of the Act. Among other things in this connection, they seem to believe that the Act has completely abrogated this Court's ruling in *U. S. v. South-Eastern Underwriters Assn., et al.*, 322 U. S. 533, that insurance is interstate commerce (see their subheading on p. 13)

whereas, in fact, the Act fully adopts⁹, and could not constitutionally have been enacted except on the basis of, that ruling.

All agree that the McCarran Act was passed to meet the situation created by the decision of this Court in the *S. E. U.* case, *supra*. In that case the question was whether certain business practices on the part of some 200 fire insurance companies operating in six Southern States (which would constitute violations of the Sherman Act if committed by other type businesses engaged in interstate commerce) were subject to the anti-trust laws enacted by Congress under the Commerce Clause of the Federal Constitution. In holding that they were so subject, this Court ruled that the business of insurance is interstate commerce within the meaning of that Clause. To clarify the situation created by that recognition of insurance as commerce and the interstate characteristics of the insurance business generally, and to prevent State statutes taxing and regulating the activities of those insurance companies which do business in more than one State from becoming subject to attack on the constitutional ground that they restrain, or impose undue burdens on, interstate commerce, the 79th Congress enacted Public Law 15, approved March 9th, 1945, known as the McCarran Act (15 U. S. Code Secs. 1011-1015).

Sec. 1 of that Act declared "that the continued regulation and taxation by the several States of the business of insurance is in the public interest". Aside from the moratorium provision (Sec. 3(a), which is not involved here), the essence of the rest of the Act

⁹ See in particular Sec. 3(b) and Sec. 4 and the proviso in Sec. 2(b).

is that, with certain specific exceptions,¹⁰ "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business" and that the Federal anti-trust laws are applicable only "to the extent that such business is not regulated by State law". Thus, both the cause for its enactment and the phraseology of the Act itself—including the provision in Sec. 3(a) for a moratorium in respect of the various Federal anti-trust laws until the States could legislate in that field—would seem to make it clear that Congress merely sought to sanction the continuation of existing State systems for the regulation of business practices of, and the taxation of, the insurance business generally rather than to give the States any new and greater powers than they had possessed prior to the *S. E. U.* decision of this Court.

The House Report on the Bill as enacted explicitly stated:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-Eastern Underwriters Association* case." H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3.

¹⁰ The only one of such exceptions having any relevancy here is the provision in Sec. 4 that "nothing contained in this Act shall be construed to affect the application to the business of insurance of . . . The Merchant Marine Act, 1920". The reference, it is to be noted, is to the whole Act, not merely to Sec. 29 thereof. The 1920 Act (46 U. S. Code Sec. 861, *et seq.*) declared the public policy of Congress to foster a well-balanced American merchant marine and to that end contained a provision (Sec. 29) designed, after extensive investigation and hearings, to place marine insurance companies in the American market in a position to compete advantageously with marine insurers abroad.

As to the validating effects of the McCarran Act on State Legislation in the insurance field, this Court in *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408 (1946), recognized that that Act is not effective to validate State legislation in contravention of other constitutional provisions than the Commerce Clause. Thus, at p. 430, it was pointed out that it is not

“necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress’ power. And we agree with *Prudential* that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.

But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.”

Since, as pointed out by this Court, the McCarran Act was passed only to sustain existing and future State legislation relating to insurance from attack

under the Commerce Clause and not to validate State legislation in contravention of other constitutional provisions, that Act obviously gives no support to the validity of the Texas statutes relied upon by the petitioners which we have shown under Point II to be unconstitutional as an invasion of substantive principles of the general maritime law existing by virtue of the grant of judicial power to the United States over cases of admiralty and maritime jurisdiction in Art. 3, Sec. 2, of the Constitution.

Interwoven with petitioners' contentions as to the effect of the McCarran Act is their repeated reliance on *Hooper v. California*, 155 U. S. 648 (cited at pp. 14, 15, 17, 23, 25 and 29 of their brief). It would seem, however, that they have misread, and misinterpreted the rule and effect of, that decision, and that, for several reasons, the Court of Appeals was clearly right when, in its opinion herein, it stated that "the *Hooper* case and the McCarran Act have no application here, and, if more need be said, the *Hooper* case does not involve a conflict between State law and the law of admiralty and cannot aid appellants even if, as they contend, it has been revived by the McCarran Act" (R. 205-6).

Even aside from the fact that the *Hooper* case, *supra*, was decided half a century before the *S. E. U.* case (322 U. S. 533) ruling and at a time when it was considered to be well settled that insurance was not interstate commerce, a consideration of the material facts and actual decisions in the *Hooper* case and also in the companion and the virtually identical case of *Nutting v. Massachusetts*, 183 U. S. 553 (which is also cited by petitioners herein), will show that, in both instances, it was merely held that a State penal statute,

making it a misdemeanor for an insurance broker, resident in the State, to procure or agree "to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of the State", or duly admitted to do business therein, is a valid regulation of insurance brokerage business conducted within the State by a resident broker thereof and that such action by an insurance broker is not subject to an implied exemption in cases where the broker's agreement with the assured is to procure marine insurance¹¹ rather than some other type of policy. In neither opinion is there a single line with reference to the validity of the marine insurance policy thus obtained by the assured nor as to State statutes being applicable to the maritime contract evidenced by the policy of marine insurance nor as to their governing the substantive rights and liabilities of a resident assured and a foreign marine insurer. Neither the arguments of counsel nor this Court's opinion in either of those cases contain any reference to Art. III of the Constitution.

Thus, even conceding, *arguendo*, petitioners' companion contention at pp. 28-29 of their brief that the effect of the McCarran Act (15 U. S. C., Sec. 1011) is to make the legal situation the same as if this Court

¹¹ A contract to procure marine insurance is non-maritime in its nature; and an action thereon thus is wholly outside the scope of admiralty and maritime jurisdiction referred to in both Art. III, Sec. 2, and the implementing section of the Judicial Code (28 U. S. Code, Sec. 1331). See, *inter alia*, *Va.-Car. Chemical Co. v. Chesapeake Lighterage Co.*, 279 Fed. 684, 686 (2nd Cir.); *United etc. Co. v. N. Y. & Balt. etc. Line*, 185 Fed. 386, 390 (2nd Cir.); *Marquardt v. French*, 53 Fed. 630 (S. D. N. Y.). Our admiralty courts have no jurisdiction thereof even when it is incident to a contract otherwise strictly maritime, such as a bill of lading or a charter party. *Royster v. Hedger*, 48 F. (2d) 86, 87 (2nd Cir.); *Osterhoudt v. Hedger Transp. Co.*, 54 F. (2d) 282, 284 (2nd Cir.).

in the *South-Eastern Underwriters* case (322 U. S. 533) had not ruled the *business* of insurance to constitute interstate commerce, the decisions in the *Hooper* and *Nutting* cases, *supra*, have no bearing on the basic question in the case at bar, *i. e.*, whether State statutes can displace or materially modify the substantive general maritime law governing maritime contracts of marine insurance.

Petitioners' arguments based on the *Hooper* case thus are another example of the fallacy arising from their failure to differentiate between permissible State regulation of the business activities of marine insurance companies and the question as to what substantive law determines the rights and liabilities created by policies of marine insurance.

In summary, it is to be seen from the foregoing that the sole purpose of the McCarran Act was to preserve State statutes regulating and taxing the business of insurance from attack based on the ruling of this Court in the *S. E. U.* case that insurance constituted interstate commerce and that the Act was not intended to, and does not by its terms, augment the regulatory powers of the States and validate State laws which would previously have been, and still are, unconstitutional on other grounds.

In short, for the several reasons set forth above, the Court of Appeals was clearly right when it ruled herein that neither the McCarran Act nor the *Hooper* case, *supra*, has "application here" (R. 205).

POINT IV

The right of the respondent to have its liabilities determined according to the general maritime law is a constitutional right of which it may not be deprived by State law.

By its grant to the United States of judicial power over cases of admiralty and maritime jurisdiction in Article III, Sec. 2, of the Constitution, "the Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law." *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 160. In that case, this Court quoted from its former decision in *The Lottawanna*, 21 Wall. 558, 575, where this Court said:

" 'One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulations of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed.' " (*Ibid.* 161.)

The doctrine that the Constitution established the principles of the general maritime law operating uniformly in the whole country as the law of the land, not subject to regulation or modification by the States, has been the uniform holding of this Court. *Southern Pac. Co. v. Jensen*, 244 U. S. 205; *Chelentis v. Luck-*

enbach S. S. Co., 247 U. S. 372; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 43; *O'Donnell v. Great Lakes D. & D. Co.*, 318 U. S. 36, 40; *Pope & Talbot, Inc. v. Hawk*, 346 U. S. 406, 409-10.

In *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244, n. 10, this Court said:

“Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle. Cf. *The Lottawanna*, 21 Wall. 558, 575; *Detroit Trust Co. v. The Thomas Barlum*, 293 U. S. 21, 43.”

Since the policy of marine insurance here involved is a maritime contract deriving its force and effect from the general maritime law, the respondent has a constitutional right to have the substantive rights and liabilities existing between the parties to such contract determined according to the general maritime law.

Any State statute depriving a party of, or in any way infringing upon, such constitutional right is invalid under Art. VI, Sec. 2, of the Constitution which provides:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; * * * anything in the Constitution or laws of any State to the contrary notwithstanding.”

In *Insurance Co. v. Morse*, 20 Wall. (87 U. S.) 445, the question involved was the constitutionality of a Wisconsin statute which required foreign insurance companies, as a condition precedent to being admitted

to do business in that State, to file an agreement not to remove to the Federal courts any suit brought against it in the courts of the State. This Court held at p. 458 that Art. III, Sec. 2, of the Constitution "secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal Court" and that the "Statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void". This has been the uniform holding of this Court. *Barron v. Burnside*, 121 U. S. 186, 197-9, 200; *Southern Pacific Co. v. Denton*, 146 U. S. 202, 207-8; *Terral v. Burke Construction Co.*, 257 U. S. 529, 532. See also, *inter alia*, *Hanover Ins. Co. v. Harding*, 272 U. S. 494, 507-8, 514, 517. This Court there stated the controlling rule to be that (p. 514) "while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights."

The same article and section of the Constitution which extended the judicial power of the United States to "controversies * * * between citizens of different States" extended that judicial power "to all cases of admiralty and maritime jurisdiction" which grant has been held to establish and create the entire body of the Federal general maritime law. It follows, we submit, that that grant "secures to citizens * * * an absolute right" to have their substantive rights and liabilities arising out of maritime contracts, including policies of marine insurance, which derive their validity and effect from the general maritime law, determined according to that law and that any State statute which obstructs or interferes with that right is therefore "repugnant to the Constitution" and is "illegal and void".

Manifestly, the foregoing point and the legal principles applicable thereto are wholly separate and distinct from the issue presented in *Watson v. Employers Liability Assur. Corp.* (202 F. (2d) 408, cert. granted 247 U. S. 958), now pending in this Court, in that the constitutional law point raised by the liability insurer in that case does not in any way involve Art. III, Sec. 2, but rests solely on the due process clause of the Fourteenth Amendment. It is also to be borne in mind that that case is a tort action in which third parties seek the benefit of a "direct action" statute whereas the case at bar is a contract action on a marine insurance policy wherein one of the parties to the contract, *i. e.*, the assured, seeks to have the *inter se* rights and liabilities created by that maritime contract determined by State law in displacement of the general maritime law from which the contract "derives all its material rules and incidents" (p. 31 of 11 Wall.). As shown above, parties to a maritime contract are vested under Art. VI, Sec. 2, with an absolute right to have their substantive, contractual rights thereunder determined by the uniform rules of the general maritime law adopted by the "admiralty and maritime" clause of Art. III, Sec. 2, as "the supreme law of the land".

Conclusion

The policy of insurance here involved is a typical policy of marine insurance. It is a maritime contract based upon, and deriving its material incidents from, the general maritime law. The general maritime law was adopted and established as the law of the land by Art. III, Sec. 2, of the Constitution. Uniformity is one of its essential qualities. Marine insurance,

of all maritime contracts, is peculiarly dependent upon the uniform application of the principles of the general maritime law to the determination of substantive rights thereunder. That law is beyond the power of the States to modify or displace. Specifically, since policies of marine insurance sprang from, and involve fundamental principles of, the general maritime law, the substantive rights of the parties thereunder are not subject to modification or qualification by State statutes. The application of State statutes (such as the several statutes of Texas here relied upon by the petitioners) to the provisions of a policy of marine insurance in order to alter the effect given to such contract terms by well settled rules of the substantive law of marine insurance would constitute an unwarranted invasion of the field of the general maritime law. It would also be a denial of a marine insurer's constitutional right under Art. VI, Sec. 2, to have its obligations to its assured under such maritime contract determined according to the general maritime law as adopted in this country. Petitioners' election of a common law remedy to enforce their rights under this maritime contract, on which an action in admiralty could have been filed, does not affect the applicability of the foregoing principles.

The McCarran Act does not authorize such invasion of the field of maritime law governing marine insurance contracts nor protect State statutes from invalidity under Art. III, Sec. 2, of the Constitution. That Act only protects State statutes, "enacted * * * for the purpose of regulating the business of insurance or which imposes a fee or tax on such business", from invalidity under the Commerce Clause. It does not make constitutional statutes which would have been

unconstitutional prior to the decision of this Court in *U. S. v. South-Eastern Underwriters Assn.*, 322 U. S. 533.

For the foregoing reasons, the rulings of the lower Courts herein should be affirmed in all respects.

Respectfully submitted,

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New York City,
September 24, 1954.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 7

WILBURN BOAT COMPANY, et al.,

Petitioners,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Respondent.

PETITION FOR REHEARING.

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Comes now the said Respondent and petitions the Court to grant a rehearing, and upon such rehearing to affirm the judgment below.

And Respondent, so petitioning, respectfully shows:

The majority opinion holds that marine insurance is a matter of admiralty and maritime jurisdiction. It makes no question that *this* marine insurance policy is a matter of admiralty and maritime jurisdiction. It recognizes that this Court has power, in the exercise of the admiralty and maritime jurisdiction committed to it by the Constitution, to ascertain and declare the law that governs this case. It assumes that *this* Court has never before ascertained the admiralty rule that governs the case, and concludes therefrom that there is no admiralty rule to govern it. It refuses that exercise of the judicial power

of the United States that consists of ascertainment of the admiralty rule—in favor of the powers of the several states to declare the law that governs this matter of admiralty and maritime jurisdiction.

If there is any one continuity that the Constitution has been conceived to establish, it is the demarcation between the power of the national sovereign, and the state sovereigns, to declare law.

The conventions that produced the Constitution devoted most of their time to examining the various aspects of that demarcation. Perhaps no fact of our constitutional history is more certain than that our system was founded on the faith of a compact, consented to by the people, that such a demarcation *was* established by the Constitution—one that those who thereafter might be repositories of sovereign powers, federal and state, would respect.

The history of the formation of our Constitution leaves no doubt at all that if it had been supposed that thereafter the nation, or the states, could rightfully transgress the demarcation so established, the Constitution could not possibly have been adopted.

It is not conceivable that a new national sovereign should have been created, while local state sovereignties were at the same time continued, without fixing some permanent principles of the separation of their powers.

Even where problems of dual sovereignty are not undertaken, the first and fundamental characteristic of any constitutional system is, necessarily, and *de facto*: what sovereign is the source of the law?

The question raised by this Court's decision is the fundamental one: is there any *constitutional* principle

upon which the source of law in the admiralty and maritime jurisdiction is vested in the national sovereign on the one hand, or the several state sovereigns on the other? Or, is that a matter left at large by the Constitution, and thus subject to *ad hoc* determination in every case, as this Court may assign that aspect of sovereign power to the national sovereign on the one hand, or to local sovereigns on the other?

If there is a constitutional principle for the determination of that question, to ignore it was called by this Court, speaking by Chief Justice Marshall "treason to the Constitution." (*Cohens v. Virginia*, 6 Wheaton, (19 U.S.) 264, 403.

The majority opinion of this Court discovers no such principle in the Constitution. It mentions none, subsumes none. On the contrary, on considerations of policy which the majority considers to be "warnings", but which are not expressly or by any implication related to any demarcation of national and state powers made by the Constitution, it assigns the power to ascertain, declare—even to make—the substantive law governing a great field of *admitted* admiralty and maritime jurisdiction to the states, simply by refusing to exercise the admitted judicial power of the United States to ascertain and declare the substantive maritime law. It says: "We refuse to undertake the task."

To decide, now, as though no guiding demarcation between national and state power were to be found in the Constitution, is, indeed, "suddenly to jettison the whole history of the admiralty provision of Article III."

The assumption of the majority that there is no principle to be discovered in the Constitution that assigns power to declare the law governing the admiralty and maritime jurisdiction to the nation on the one hand, or to the states on the other, necessarily sends us back to the fundamentals of constitution-making. The Court contemporaneous with the Constitution, speaking by its great Chief Justice, made the principle very clear, as a principle arising from the terms and purposes of Article III. That Article of the Constitution commits "the judicial power of the United States" to this Supreme Court and such other courts as Congress from time to time establishes. The subjects of that judicial power of the United States, so vested in them, are ascertained upon two kinds of test—the nature of the parties, and the nature of the subject matter. Because these are plainly different, different considerations necessarily occasion the assignment of these two categories to national judicial power. These considerations are manifest from the nature of these two categories themselves, read in the context of a Constitutional document creating dual sovereignties.

"It is manifest, that the constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The constitution has presumed (whether rightly or wrongly, we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens or foreigners, and between citizens and foreigners, it enables the parties, under the

authority of congress, to have the controversies heard, tried and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognisance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

“This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret the statute, or a treaty of the United States, or even the constitution itself; if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different, in different states, and might, perhaps, never have precisely the same construction, obligation or efficiency in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.”

Martin, etc. v. Hunter's Lessee, 1 Wheat. (14 U. S.) 304, 346-348 (1816, per Marshall, C.J.)

That this principle arises on the historical context, general frame, specific terms, and plain purposes of the Constitution, has not been considered an open question in this Court.

“ . . . the grant presupposes a ‘general system of maritime law’ which was familiar to the lawyers and statesmen of the country, and contemplated a body of law with uniform operation.” (Our emphasis)

Detroit Trust Co. v. The Barlum, 293 U. S. 21, 43, (1934).

One thing is very plain: judicial power granted on that principle cannot be abdicated to the states without subverting the constitutional object of the grant. *Legislative* power may declare the law, or not. *Judicial* power, granted on the principle stated, cannot be exerted or abdicated at the pleasure of the federal tribunal, without subverting the object of national uniformity which was the very purpose of the grant. The opinion of the majority declines to exercise judicial power concededly vested in it by Article III, and so declines for the avowed purpose of destroying national uniformity.

“It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur, which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In

doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.”

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 404.

To exercise the judicial power of the United States is not to refer judgment to state laws, where that jurisdiction is given by the Constitution because of the nature of the subject matter—the need of national uniformity.

The cases just quoted are landmarks of our law upon the question whether the sovereign power of the several states, or the judicial power of the United States, is authoritative as to the law that governs matters that the Constitution assigns, by reason of their subject matter, to the judicial power of the United States. These expressly include “all matters of admiralty and maritime jurisdiction.” This Court, so far as we can find, has never doubted that the constitutional principle so declared, for the purposes so described, fully applies thereto.¹

¹ There are a few instances in which the substantive admiralty law itself is that the granting of an admiralty remedy is discretionary, much as the granting of equitable relief turns on the adequacy of legal remedy. The principle referred to does not change the substantive maritime law in that respect, and has no application thereto. In such cases the constitutional principle is fully observed by applying the admiralty rule that admiralty relief is discretionary, as, where the matter arises between foreigners. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413, 422-423 (1932). That represents no surrender of federal judicial power in favor of state powers, as the court there affirms.

“The case of *Cohens v. Virginia*, 6 Wheat. 264, 404 and *McClelland v. Carland*, 217 U.S. 268, 281, denied the right to abdicate to state courts jurisdiction which the Constitution in positive terms entrusts to the federal judiciary.”

Canada Malting Co. v. Paterson Co., *supra* 423.

“The objection is founded upon the assumption, that these rules involve a question as to the extent of the admiralty jurisdiction granted by the Constitution. And as the court could not, consistently with its duty, refuse to exercise a power with which it was clothed by the Constitution and laws, the appellants insist that the alteration made by the rule in 1858 must be regarded as an admission that the court had fallen into error when it adopted the rule of 1844, and had exercised a jurisdiction beyond its legitimate boundary; and if the admiralty court had not the right to enforce a State lien in a case of this kind, the rule then in force could not enlarge its jurisdiction, nor authorize the decree of the Circuit Court which supported and enforced this lien.

“The argument would be unanswerable, if the alteration related to jurisdiction; *for the court could not, consistently with its duty, refuse to exercise a power which the Constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right.*” (Our emphasis)

The Steamer St. Lawrence, 66 U. S. 522, 526
(1861)

“‘One thing, however, is unquestionable; the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.’”

Chelentis v. Luckenbach S. S. Co., 247 U.S. 372,
382 (1918)

“It is remarkable, too, that the words, ‘all cases of admiralty and maritime jurisdiction,’ as they now

are in the constitution, were in the first plan of government submitted to the convention, and that in all subsequent proceedings and reports they were never changed. There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately."

Waring, et al. v. Clarke, 46 U.S. 440, 457 (1847)

The difference appearing between the majority and Mr. Justice Frankfurter is that the majority ignores the above-stated constitutional principle arising from Article III, upon which the power to declare the law governing the admiralty and maritime jurisdiction is assigned to the nation. For the constitutional principle is that in all matters assigned by it to final federal judicial power because of their subject matter, including all matters of admiralty and maritime jurisdiction, the judicial power of the United States is made supreme by a policy adopted as to such matters by that supreme source of law itself, namely, a policy of national uniformity. That may be good or bad policy, but it is the Constitution's policy; that act of the whole people does not contemplate that the law on matters so assigned to the federal judicial power shall fluctuate from state to state, but that it shall be uniform throughout the nation. Arguments may be made, pro and con, as to the desirability of nationally uniform law, as to one or another of the heads of federal judicial power assigned to national power because of their subject matter mentioned by Article III--arguments, that is to say, whether the Constitution was wise or unwise, in extending that policy to the one, or to the other. And the case for the wisdom, or unwisdom, of the Constitution may seem to different judges at different times con-

vincing as to one such head of jurisdiction, and unconvincing as to another. But if the Constitution is to result in any continuities at all, its wisdom or unwisdom cannot be taken *de novo* as every case arises. The principle that arises from the Constitution, the principle of national uniformity of law as to the substantive heads of the judicial power of the United States as to matters assigned thereto by the Constitution because of their subject matter, is not divisible by any test *that can be derived from the Constitution itself*.

The decision for national uniformity of law on the substantive heads assigned to federal judicial power because of their subject matter was an act of constitution-making, accomplished by the Constitution itself, part and parcel of the demarcation between national and local powers that that instrument was designed to make "constitutional" in our system—*viz.*, to perpetuate. If it is open to be overhauled on any head of such jurisdiction, as arguments of policy for or against the constitutional plan may, from time to time, be considered persuasive, it is no longer the policy of the Constitution that is observed but the policy of the majority of this Court. Speaking of the phrase "admiralty and maritime jurisdiction" as used in Article III, it has never been doubted that:

"One thing, however, is unquestionable; *the Constitution* must have referred to a system of law co-extensive with, and operating uniformly in, the whole country." (Our emphasis)

The Lottawanna, 21 Wall. (88 U.S.) 558, 575.

The law of marine insurance is, admittedly, integral to the admiralty and maritime jurisdiction. *Ins. Co. v. Dunham*, 11 Wall. (78 U.S.) 1.

What the majority does is to substitute its interpretation of "warnings" for the principle of the Constitution, which is the principle of national uniformity as to the law that governs the admiralty and maritime jurisdiction. That, we submit, is to substitute the views of justices as to desirable constitutional policy for the constitutional policy of the Constitution. It is respectfully submitted that if the constitutional principle is the rule that governs the exertions of sovereign power, including the judicial power, that is an *ultra vires* act. Such considerations appear to underlie the different approach of Mr. Justice Frankfurter, who would recognize the constitutional principle, but would put this case outside the national uniformity principle in its facts. We beg to address a word to that.

Lake Texoma is relatively small. Argument could be made as to its thousands of miles of coastline, its thousands of vessels enumerated under federal authority, the federal authority presently exercised there by the United States Coast Guard—all appearing from the record.

Rather more significant than that, as we believe, Lake Texoma is, admittedly, part of the navigable waters of the United States; those are *not* small.

But more fundamental, as we submit, than any matter of mere physical extensivity, is the circumstance that the Constitution is addressed to the problem of national uniformity of law—to a "political" problem and a constitutional solution of it; and that problem is encountered, and the need for the solution provided by the Constitution arises, whenever navigation is conducted across a state line. For then the matter concerns "more states than one." It is as clearly the problem to which the constitutional solution is addressed, when it arises only be-

tween Texas and Oklahoma, as it was between New York and New Jersey. (*Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1) (And, incidentally, this policy covered this vessel on the navigable waters of the United States *in five states*.)

As to the size of the vessel, that does not affect the political problem that arises respecting her when the question is, what law shall govern? That is the same problem, with the same difficulties and incidents, and, we must suppose, with the same constitutional solution, whatever the size of the vessel may be.

Nor does it appear to affect those considerations that the vessel was supposed to be confined to pleasure use only. No relevance of such a distinction is suggested, or appears, as to the political problem to which the constitutional solution is addressed, the problem of whether a national law shall govern. No such distinction has ever been regarded as relevant to any question of maritime jurisdiction. See *U. S. v. Appalachian Electric Power Co.*, 311 U. S. 377, 407-409, 426 (1940). And, finally, of course, the vessel was not used as a pleasure vessel.

Turning now to different considerations, the majority says that two questions arise, *viz.*, whether there is a judicially established federal admiralty rule; if not, whether this Court should "fashion" one.

The second question does not arise unless the first is negatively answered.

The first question is disposed of by the majority by saying that *this* Court never announced any rule on the problem presented by the case. The premise, thus taken for granted, is that no rule of admiralty and maritime jurisdiction ever exists that this Court has not stated.

That would wipe out most of the admiralty and maritime law at one blow.²

The Constitution refers to "matters of admiralty and maritime jurisdiction." When the Constitution took effect, this Court had rendered no decisions. On this Court's above premise, there was no law whatever to rule that jurisdiction! The whole history of our jurisprudence, before and since the Constitution, denies that premise. The Constitution refers to "cases in law and equity" and "suits at common law" and matters of "admiralty and maritime jurisdiction." There was—as a matter of undeniable historical fact—an existing body of law that fell under each of those heads, each of which was promptly applied as existing law by the courts exercising the judicial power of the United States. It would be as inconceivable to say that there was no rule of law governing the necessity of consideration for a contract, or clean hands in equity, until this Court declared it, as to say that there were no rules of maritime law until this Court states them. This

² The judicial power of the United States under the Constitution is not vested in this Court alone, but in this Court "and in such inferior courts as the Congress may from time to time ordain and establish" (Art. III) and these other courts are invested to the full extent of their statutory jurisdiction with the full judicial power of the United States, as was decided long ago. *Osborn v. Bank of U. S.*, 22 U.S. 737 (1824). When the courts exercising the judicial power of the United States, including courts of appeal, have repeatedly announced the admiralty rule on the subject, the Constitutional fact that those courts in announcing that rule exercised the judicial power of the United States, would alone preclude assumption of the majority that there is no judicially established federal admiralty rule on the point—although the more fundamental consideration is that pointed out by Mr. Justice Reed and elsewhere herein, that upon those matters assigned to federal judicial power by the Constitution because of their subject matter the Constitution itself contemplated an existing and nationally uniform body of law—maritime law, common law, and equity.

Court proceeds to ascertain law *judicially*, from judicial sources, in common law and equity and admiralty. It does not proceed *legislatively*, on its unhampered views of policy, in admiralty. A typical example is *The Osceola*, 189 U. S. 158 (1903), where the particular existing admiralty rule was declared "upon a full review of all the cases, English and American," not one of which was a decisive decision by *this* Court of the particular rule so ascertained.

"Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law,' without defining those terms, assuming them to be known and understood.

"One thing, however, is unquestionable: the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country."

• • • • •

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it **broad**er, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on *what has been received as law in the maritime usages of this country*, and on such legislation as may have been competent to affect it." (Our emphasis)

The Lottawanna, 21 Wall. (88 U. S.) 558, 574-575, 576.

That there was at the time of the Constitution an existing body of law governing matters of admiralty and maritime jurisdiction has long been settled in this Court.

Panama R. R. Co. v. Johnson, 263 U. S. 375, and auth. cit.

That the very rule here contended for existed as to marine insurance when the Constitution was adopted, is cogently shown by the opinion of Mr. Justice Reed. That it has been declared many times since by federal courts exercising "the judicial power of the United States" in admiralty (with no cases to the contrary), not as a quasi-legislative determination, but as the ascertainment of admiralty law antedating the Constitution, is undeniable. (See, e.g., *Aetna Ins. Co. v. Houston Oil & Trans. Co.*, 49 F. 2d 121; cert. den. 284 U. S. 628).³

It was not the argument of these petitioners that there is no admiralty rule on this subject. The lower court, in common with other federal courts, found there was, and what it was, and Petitioners did not make question as to that. The existence, and propriety, of the admiralty rule on this subject were not before this Court. Petitioners' position was that the admiralty and common law rule are the same, and equally subject to change by state power. A party is required to disclose his legal position to the other party, as an essential of that fairness which due process guarantees.

³ "The English rule is that express warranties are to be literally complied with. *Arnould on Marine Insurance* (11th Ed.) § 630. The federal courts have generally adopted this rule. In perhaps the first reported American decision, *Ogden v. Ash*, 1 Dall. 162, 1 L. Ed. 82, it was held that a warranty of this kind must be strictly complied with, . . ." *Aetna Ins. Co. v. Houston Oil & Trans. Co.*, 49 F. (2d) 121 at page 124.

It is difficult to believe that fairness allows the Court to proceed by surprise, any more than it allows the party to do so.

But the effect of the majority opinion goes far beyond the mere loss of a judgment inflicted on a party. To lose a case is one thing. To lose the law is frightening.

Wherefore, the said Respondent prays that a rehearing be granted herein, and that upon such rehearing the judgment of the Court of Appeals herein, affirming the judgment of the District Court, may be affirmed.

Respectfully submitted,
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